Supreme Court, U.S.
FILED
961777 MAY 8 1997
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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

E.I. DU PONT DE NEMOURS AND COMPANY,

Petitioner,

v.

THE BUSH RANCH, INC., WILLIAM R. LAWSON, YELLOW RIVER GROWERS, ROY PHILLIP BARBER, CAROL H. BARBER, AND C. RAKER & SONS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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May 8, 1997

143 pp

QUESTIONS PRESENTED

1. Did the Eleventh Circuit err by remanding, rather than dismissing, this inherently criminal private action?

2. Did the Eleventh Circuit err by holding that the interpretation of a court order for purposes of contempt is a question of *fact* rather than of *law*?

3. Did the Eleventh Circuit err by holding that criminal contempt sanctions may be imposed in this case based in part on the alleged violation of a discovery duty that was not created until *after* the conclusion of the underlying *Bush Ranch* litigation?

RULE 29.6 STATEMENT

Petitioner, E.I. du Pont de Nemours and Company, ("DuPont") has no parent company.

There are presently five publicly held entities in which DuPont, or a subsidiary or affiliated company of DuPont, owns an interest: DuPont Canada, Inc. and DuPont Photomasks, Inc. are subsidiary companies, and Hudson Technologies, Inc., Shaman Pharmaceuticals, Inc., and DNAP Holding Corporation are companies in which DuPont holds a minority, non-controlling interest.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

A. The Underlying *Bush Ranch* Litigation 1

B. The District Court Proceedings 3

C. The Eleventh Circuit Proceedings 5

REASONS FOR GRANTING THE WRIT 6

I. The Eleventh Circuit Erred by Remanding, Rather than Dismissing, this Inherently Criminal Private Action. 6

II. The Eleventh Circuit Erred by Holding that the Interpretation of a Court Order for Purposes of Contempt is a Question of Fact Rather than of Law. 10

III. The Eleventh Circuit Erred by Holding that Criminal Contempt Sanctions May Be Imposed in this Case Based on the Alleged Violation of a Discovery Duty Created After the Conclusion of the *Bush Ranch* Litigation. 14

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Blalock v. United States,
844 F.2d 1546 (11th Cir. 1988) 7

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.,
380 F.2d 570 (D.C. Cir.), *cert. denied*, 389 U.S. 327 (1967) 9

Butz v. Economou,
438 U.S. 478 (1978) 7

Calder v. Bull,
3 Dall. (3 U.S.) 386 (1798) 18

Common Cause v. Nuclear Regulatory Comm'n,
674 F.2d 921 (D.C. Cir. 1982) 11

Cooper v. Texaco, Inc.,
961 F.2d 71 (5th Cir. 1992) 11

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 8

D. Patrick, Inc. v. Ford Motor Co.,
8 F.3d 455 (7th Cir. 1993) 7

Downey v. Clauder,
30 F.3d 681 (6th Cir. 1994) 14

Ex Parte Terry,
128 U.S. 289 (1888) 10

Page

Finn v. Schiller,
72 F.3d 1182 (4th Cir. 1996) 7

Fonar Corp. v. Deccaid Servs., Inc.,
983 F.2d 427 (2d Cir. 1993) 14

Ford v. Kammerer,
450 F.2d 279 (3d Cir. 1971) 11

Gates v. Shinn,
98 F.3d 463 (9th Cir. 1996) 14

Gompers v. Buck's Store & Range Co.,
221 U.S. 418 (1911) 7

Grace v. Center for Auto Safety,
72 F.3d 1236 (6th Cir. 1996) 11, 14

Harris v. City of Philadelphia,
47 F.3d 1333 (3d Cir. 1995) 13

Heckler v. Chaney,
470 U.S. 821 (1985) 7

Hess v. New Jersey Transit Rail Ops.,
846 F.2d 114 (2d Cir. 1988) 11, 14

Hoover v. Department of Interior,
611 F.2d 1132 (5th Cir. 1980) 16

In re Lahm Industries,
609 F.2d 567 (1st Cir. 1979) 9

Page

International Union, United Mine Workers v. Bagwell,
512 U.S. 821 (1994) 7, 10

Jackson v. Virginia,
443 U.S. 307 (1979) 5, 11-12, 13

Keenan v. McGrath,
328 F.2d 610 (1st Cir. 1964) 7

Kienle v. Jewel Tea Co.,
222 F.2d 98 (7th Cir. 1955) 8, 9

Landgraf v. USI Film Prods.,
114 S. Ct. 1483 (1994) 18

Local 28, Sheet Metal Workers v. EEOC,
478 U.S. 421 (1986) 7

Miller v. Florida,
482 U.S. 423 (1987) 18

Musidor, B.V. v. Great American Screen,
658 F.2d 60 (2d Cir. 1981), *cert. denied*,
455 U.S. 944 (1982) 9

NBA Properties, Inc. v. Gold,
895 F.2d 30 (1st Cir. 1990) 11, 12

R.W. Int'l Corp. v. Welch Foods, Inc.,
937 F.2d 11 (1st Cir. 1991) 17

Ramos Colon v. United States Attorney,
576 F.2d 1 (1st Cir. 1978) 9

Page

Reliance Ins. Co. v. Mast Constr. Co.,
84 F.3d 372 (10th Cir. 1996) 11

Town of Islip v. Eastern Air Lines, Inc.,
793 F.2d 79 (2d Cir. 1986) 11

United States Catholic Conf. v. Abortion Rights Mobilization, Inc.,
487 U.S. 72 (1988) 7

United States v. Berg,
20 F.3d 304 (7th Cir. 1994) 11

United States v. Heth,
3 Cranch (7 U.S.) 399 (1806) 18

United States v. Joyce,
498 F.2d 592 (7th Cir. 1974) 14

United States v. Koblitz,
803 F.2d 1523 (11th Cir. 1986) 11

United States v. McMahon,
104 F.3d 638 (4th Cir. 1997) 11

United States v. O'Quinn,
913 F.2d 221 (5th Cir. 1990) 13-14

Young v. United States ex rel. Vuitton et Fils S.A.,
481 U.S. 787 (1987) 10

STATUTES & OTHER AUTHORITIES

Page

Fed. R. Civ. P. 26(b)(4) (1970) 13, 15, 16

Fed. R. Civ. P. 26(e) (1970) 6, 15, 17, 18

28 U.S.C. § 1254(1) 1

28 U.S.C.A. Rule 26 17-18

8 C. Wright & A. Miller, Federal Practice & Procedure § 2049 (1970) 18

E.I. du Pont de Nemours and Company respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 99 F.3d 363 (1996) and is reprinted in the Appendix ("App.") at 1a-19a.

The opinion and order of the District Court is reported at 918 F. Supp. 1524 (M.D. Ga. 1995) and is reprinted at App. 27a-94a.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on October 17, 1996. DuPont filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc*, which was denied on December 26, 1996. *See* App. at 21a-24a. On March 11, 1997, the Honorable Anthony M. Kennedy, Circuit Justice for the Eleventh Circuit, extended the time for filing a petition for a writ of *certiorari* to and including May 8, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Underlying *Bush Ranch* Litigation

This case had its unusual genesis in four consolidated product liability cases (known collectively as *Bush Ranch*) that settled during trial in 1993. The plaintiffs, several plant nurseries, claimed that a DuPont fungicide, Benlate 50DF, was contaminated with herbicides known as sulfonylureas (SUs) and had damaged their plants and lands.

The discovery process in *Bush Ranch* was, by any measure, extraordinary. The plaintiffs sought, and the District Court (Elliott, J., M.D. Ga.) granted them, essentially open-ended access to DuPont's files. Consequently, DuPont produced more than *three million pages of documents* at a repository established especially for that purpose near its

headquarters in Wilmington, Delaware. The plaintiffs, however, were never satisfied; they filed a steady stream of motions asking the District Court to sanction DuPont for allegedly failing to comply with its discovery obligations. The Court held a series of hearings on these motions in the fall of 1992 and the spring of 1993, and—notwithstanding DuPont's herculean discovery efforts—imposed sanctions culminating in a $1 million fine.

All of these discovery disputes, it is important to note, involved the scope of DuPont's *general* discovery obligations; they did not involve discovery with respect to materials generated by *experts* in preparation for the trial. Indeed, the District Court did not even establish the guidelines for expert discovery until a pretrial conference on June 1, 1993. Under the terms set at that conference, the parties were not required to produce materials generated by their *non-testifying* experts except to the extent those materials were relied upon by their *testifying* experts.

Shortly thereafter, in mid-June of 1993, DuPont commissioned analytical chemists at Alta Analytical Laboratories, Inc., to test samples of the *Bush Ranch* plaintiffs' soils for the presence of SUs. Using a highly sophisticated process (liquid chromatography coupled with tandem mass spectrometry) the Alta chemists concluded that there were no SUs in any of the samples, and prepared a summary report to that effect. Because that report was relied upon by an environmental expert who testified on DuPont's behalf at trial, DuPont produced it to the *Bush Ranch* plaintiffs. DuPont did not, however, produce the raw data on which the Alta summary was based, because its testifying expert did not consult those data.

The trial began in July 1993, and lasted for six weeks. The case was submitted to the jury on August 11, 1993. While the jury was deliberating, the plaintiffs' counsel abruptly approached DuPont with an offer to settle the case for a small

fraction (roughly 1%) of the plaintiffs' demand. DuPont accepted the offer. Consequently, upon a joint motion by the parties, the District Court dismissed all of the plaintiffs' claims with prejudice on August 16, 1993. As part of the settlement, the plaintiffs' counsel certified that "during the course of this case, DuPont [came] in compliance with the Court's Orders and its discovery obligations." App. at 107a. The District Court vacated the sanctions orders and fine. *See* App. at 109a-111a.

After the settlement, the plaintiffs in a similar case against DuPont in Hawaii requested and received the raw data generated by Alta in connection with the *Bush Ranch* litigation. Notwithstanding Alta's conclusion that the tests did *not* establish SU contamination in any of the samples, the Hawaii plaintiffs produced an expert who interpreted Alta's raw data differently. In light of the production of the Alta raw data in Hawaii, certain of the former *Bush Ranch* plaintiffs threatened to sue their former counsel for malpractice for, *inter alia*, having failed to request the data.

B. The District Court Proceedings

On March 22, 1995, counsel for the former *Bush Ranch* plaintiffs initiated this action by returning to the District Court with a "petition" filed on behalf of respondents (six of the former *Bush Ranch* plaintiffs). As relevant here, that "petition" charged DuPont with having committed "a fraud upon this Court and a fraud upon the [*Bush Ranch*] Plaintiffs" by having failed to produce the Alta raw data. App. at 100a. Respondents did not, however, seek to set aside or otherwise disturb the *Bush Ranch* settlement. *See id.* at 101a. Indeed, they *expressly disavowed* any interest in compensation. *See* Petrs' Resp. in Opp. to Motion to Dismiss at 2 (emphasizing that respondents "have made *no claim personal to any of them* and have not prayed for any money damages") (emphasis added). Instead, respondents exhorted the District Court to invoke its "inherent powers" to hold DuPont in contempt for

"defiling the integrity of this Court," and to impose punitive sanctions. App. at 101a.

The day after the petition was filed, the District Court ordered DuPont to show cause why it should not be granted. DuPont immediately moved to recuse the District Judge pursuant to 28 U.S.C. §§ 144, 455(a), and 455(b). The motion was prompted by press accounts that had appeared after the *Bush Ranch* settlement suggesting that the Judge or a member of his staff had furnished the *Bush Ranch* plaintiffs' counsel with preliminary vote tallies indicating that the jury was about to rule in DuPont's favor, and had thereby induced the plaintiffs' sudden desire to settle. These press accounts were based on interviews with several of the former *Bush Ranch* plaintiffs and jurors. At DuPont's request, several of these jurors prepared sworn affidavits affirming the substance of their statements to the press. The District Judge, however, refused to recuse himself.

On August 21, 1995, the District Court issued a lengthy opinion and order adopted largely verbatim from respondents' proposed findings. *See* App. at 27a-94a. The Court declared (without identifying any specific language from any order) that DuPont had violated several of the general discovery orders in *Bush Ranch* by failing to produce the Alta raw data. *See id.* at 31a-40a. The Court accordingly held DuPont in contempt, and ordered the company to pay fines totaling nearly *$115 million* into the registry of the Court. *See id.* at 90a-94a. The Court gave DuPont the option of "purging" $101 million of these fines by publishing a full-page advertisement in *The Wall Street Journal* and other selected newspapers around the country "acknowledging its wrongdoing and giving notice of these orders and sanctions in a form to be approved by the Court." App. at 93a.

C. The Eleventh Circuit Proceedings

The Court of Appeals for the Eleventh Circuit reversed. *See* App. at 1a - 19a. The Court began by rejecting DuPont's contention that the District Court lacked jurisdiction over this action. Jurisdiction was proper, the Court asserted, in light of precedents holding that a district court may reopen its judgments or impose contempt sanctions in a case notwithstanding the entry of final judgment. *See id.* at 7a.

Turning to the merits, the Eleventh Circuit readily concluded that the District Court had violated DuPont's constitutional rights by imposing punitive (and hence inherently criminal) contempt sanctions without affording DuPont the requisite constitutional protections. *Id.* at 7a-11a.

Rather than dismissing this action, however, the Eleventh Circuit ordered a remand for possible *criminal* contempt proceedings. Although the Court agreed with DuPont that there could be no judgment of contempt in the absence of a "clear, definite, and unambiguous" order in *Bush Ranch* requiring production of the Alta data, App. at 12a (internal quotation omitted), the Court held that the clarity and scope of an order for purposes of contempt was a question of *fact* rather than of *law, see id.* at 11a-12a. Accordingly, the Eleventh Circuit described the relevant inquiry on appeal as whether "a reasonable finder of fact could conclude that there was a reasonably specific order requiring DuPont to produce the Alta data." *Id.* at 12a. In conducting that inquiry, the Eleventh Circuit asserted, "the evidence is to be viewed, and all credibility issues to be decided, in the light most favorable to the charge, and all reasonable inferences drawn in support of a guilty verdict." *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Applying the *Jackson* standard, the Eleventh Circuit held that "the record contains sufficient evidence from which a reasonable finder of fact *could* find beyond a reasonable doubt

that DuPont was ordered to produce the Alta data." *Id.* (emphasis in original). The Court began by asserting that a reasonable factfinder could construe the *Bush Ranch* plaintiffs' broad discovery requests as having been "intended" to reach expert materials such as the Alta data. *Id.* at 13a. The Court sidestepped DuPont's argument that, under the Federal Rules of Civil Procedure as well as the discovery procedures in *Bush Ranch*, expert discovery was governed by a different standard from general discovery. "These arguments are not strong enough to establish DuPont's position as a matter of law; a reasonable factfinder could reject them." *Id.* Although the Court acknowledged that "one might intuitively think" that the *Bush Ranch* plaintiffs' 1992 discovery requests could not encompass the Alta data (which did not even *exist* until June 1993), the Court insisted that DuPont had an ongoing duty to supplement its discovery responses under Federal Rule of Civil Procedure 26(e). *Id.* at 14a n.8. The Court made no mention of the fact that this duty was created by an amendment to Rule 26(e) that did not take effect until December 1, 1993, several months *after* the *Bush Ranch* cases had been dismissed with prejudice.

Two and a half weeks after entering judgment, the Eleventh Circuit *sua sponte* issued an order reassigning the case to a different District Judge on remand. *See* App. at 25a.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit Erred by Remanding, Rather than Dismissing, this Inherently Criminal Private Action.

The Eleventh Circuit erred, first and foremost, by remanding, rather than dismissing, this inherently criminal private action. That disposition has no basis in law or logic, and creates a clear conflict with holdings from other circuits.

The inherently criminal nature of this action is readily apparent. Respondents *expressly disclaimed* any interest in

pursuing compensatory or coercive relief for themselves; rather, they insisted that the whole point of this lawsuit was to "uphold and maintain the integrity and dignity of this Court" by punishing DuPont. App. at 102a. A punitive action aimed at vindicating a court's authority, of course, is the very paradigm of a criminal contempt action. *See, e.g., International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 828 (1994) (criminal contempt proceeding "'is punitive, to vindicate the authority of the court'") (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911)); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 443 (1986) ("Criminal contempt sanctions are punitive in nature and are imposed to vindicate the authority of the court."). A court's civil contempt powers, in contrast, are limited to affording compensatory or coercive relief in an ongoing proceeding; that is why "'[t]here is no such thing as an independent cause of action for civil contempt.'" *Finn v. Schiller*, 72 F.3d 1182, 1188 (4th Cir. 1996) (quoting *Blalock v. United States*, 844 F.2d 1546, 1550 (11th Cir. 1988) (*per curiam*)); *see also United States Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79-80 (1988); *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 459 (7th Cir. 1993).

Although the Eleventh Circuit recognized the inherently criminal nature of this proceeding, and hence reversed the sanctions, *see* App. at 9a-11a, the Court failed to appreciate the necessary implication of its decision: the case must be dismissed. Private parties (like respondents) have no standing to bring a criminal action. *See, e.g., Keenan v. McGrath*, 328 F.2d 610, 611 (1st Cir. 1964) (*per curiam*). Rather, the decision whether to initiate any such action rests solely within the discretion of the public authorities. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Butz v. Economou*, 438 U.S. 478, 515 (1978). Accordingly, respondents had no authority to

bring, and the District Court had no jurisdiction to entertain, this private criminal action.[1]

The Eleventh Circuit's decision to remand, rather than dismiss, this case creates a clear conflict among the federal courts of appeals. The Seventh Circuit has squarely held, on facts virtually identical to those here, that a court must dismiss an inherently criminal private contempt action. *See Kienle v. Jewel Tea Co.*, 222 F.2d 98 (7th Cir. 1955). The plaintiff there, like respondents here, brought an action seeking to punish the defendant for alleged discovery violations in a defunct case. *See id.* at 99. The Seventh Circuit held that because the "pleading sought no civil remedy for [the plaintiff] through coercive punishment of the alleged contemnor, but, on the contrary, asked the court to vindicate its power and dignity as a branch of the government by assessing a definite punishment for criminal contempt," there could be only one proper result. *Id.* at 100 (internal quotation omitted). "As soon as the trial court perceived the nature of the proceeding, the [plaintiff's] pleading should have been *dismissed* as that of an incompetent party." *Id.* (emphasis added; citation omitted). A private party, the Seventh Circuit explained, cannot initiate a criminal

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[1] To the extent it addressed jurisdiction, *see* App. at 7a, the Eleventh Circuit missed the point. The Court went out of its way to reject the proposition that "the district court 'lacked jurisdiction to entertain an independent civil action for sanctions based on alleged misconduct in the long-dismissed *Bush Ranch* litigation.'" *Id.* (quoting DuPont's Brief at 17). Instead, the Court broadly asserted that "'[a] court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated.'" *Id.* (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990)). Even a cursory glance at *Cooter & Gell*, however, reveals that this Court was there discussing a district court's jurisdiction to entertain criminal contempt proceedings initiated by the relevant public authorities notwithstanding the entry of final judgment. *See* 496 U.S. at 396. *Cooter & Gell* does not remotely stand for the proposition that a court may at any time entertain a private *criminal* contempt action or an independent *civil* contempt action. As noted in text, the settled law is squarely to the contrary.

contempt action. Rather, "[w]hether such a proceeding should be instituted is a matter concerning defendant and the public," and any such proceeding must be "conducted through the office of the court or the United States as the representative of the public in vindication of the court's dignity and authority." *Id.*

The First Circuit has held to the same effect. Thus, in *In re Lahm Industries*, 609 F.2d 567 (1st Cir. 1979), that Court confronted a situation in which a trustee in bankruptcy had prosecuted a criminal contempt charge before the district court. *See id.* at 569. In dismissing the case on appeal for lack of jurisdiction, the First Circuit explained that the trustee "did not, as a private party, have standing to prosecute the criminal contempt proceeding." *Id.* at 569-70. As a result, "[t]he district court should have *dismissed* the criminal contempt case for, without the proper parties, there was no criminal prosecution and *the court lacked jurisdiction.*" *Id.* at 570 (emphasis added). *See also Ramos Colon v. United States Attorney*, 576 F.2d 1, 5 (1st Cir. 1978) (dismissing case because "[a] party to the original litigation has no standing to prosecute an action for criminal contempt").

Indeed, until this case, the straightforward and sensible principles applied by the First and Seventh Circuits had been regarded as settled law by the other circuits. *See, e.g., Musidor, B.V. v. Great American Screen*, 658 F.2d 60, 64 (2d Cir. 1981) (noting that *Jewel Tea, Lahm*, and *Ramos Colon* hold that "the original civil litigant is not a party in interest and therefore has no standing to prosecute an action for criminal contempt on his own initiative"), *cert. denied*, 455 U.S. 944 (1982); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 380 F.2d 570, 580 (D.C. Cir.) (noting that "private parties would unarguably lack standing to initiate" criminal contempt proceedings), *cert. denied*, 389 U.S. 327 (1967).

As a practical matter, finally, the Eleventh Circuit's decision to remand this case for possible criminal contempt

proceedings makes no sense. Interested private parties (like respondents) cannot prosecute a criminal contempt action. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 802-04 (1987). The Eleventh Circuit apparently assumed that this action could serve as a springboard for launching a roving inquiry into any and all matters connected with the *Bush Ranch* litigation. Thus, for example, the Court directed the District Court on remand to "insist upon an explanation" from the *Bush Ranch* plaintiffs' counsel for having certified that DuPont had fully complied with its discovery obligations at a time when he knew that the Alta raw data existed but had not been produced. App. at 18a. But respondents' "petition" did not challenge the actions of the *Bush Ranch* plaintiffs' counsel; to the contrary, the *Bush Ranch* plaintiffs' counsel himself filed that "petition."

This case was brought by respondents and must be governed by their pleadings. Because private parties cannot initiate criminal contempt proceedings, this action must be dismissed.

II. The Eleventh Circuit Erred by Holding that the Interpretation of a Court Order for Purposes of Contempt is a Question of Fact Rather than of Law.

The Eleventh Circuit next erred by holding that the interpretation of a court order for purposes of contempt is a question of *fact* rather than of *law*. That holding again lacks any basis in law or logic, and creates a clear conflict with holdings from other circuits.

As this Court has long warned, the judicial contempt powers are "uniquely . . . 'liable to abuse.'" *Bagwell*, 512 U.S. at 831 (quoting *Ex parte Terry*, 128 U.S. 289, 313 (1888)). "Contumacy often strikes at the most vulnerable and human qualities of a judge's temperament, and its fusion of legislative, executive, and judicial powers summons forth . . . the prospect of the most tyrannical licentiousness." *Id.* (internal quotations

omitted). Accordingly, the courts' inherent contempt powers are subject to unique substantive and procedural constraints. Among other things, "[n]o one may be held in contempt for violating a court order unless the order is clear and specific and leaves no uncertainty in the minds of those to whom it is addressed." *Hess v. New Jersey Transit Rail Ops.*, 846 F.2d 114, 116 (2d Cir. 1988) (citation omitted). *Accord United States v. McMahon*, 104 F.3d 638, 642 (4th Cir. 1997); *United States v. Berg*, 20 F.3d 304, 310 (7th Cir. 1994).

Pursuant to these "unbroken lines of authority that caution us to read court decrees to mean rather precisely what they say," an appellate court reviewing a contempt judgment "must read any ambiguities or omissions in . . . a court order as redounding to the benefit of the person charged with contempt." *NBA Properties, Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990) (Breyer, J.) (internal quotations omitted). *Accord Ford v. Kammerer*, 450 F.2d 279, 280 (3d Cir. 1971) (per curiam) ("The long-standing, salutary rule in contempt cases is that ambiguities and omissions in orders redound to the benefit of the person charged with contempt."). *See also Reliance Ins. Co. v. Mast Constr. Co.*, 84 F.3d 372, 377 (10th Cir. 1996); *Grace v. Center for Auto Safety*, 72 F.3d 1236, 1241 (6th Cir. 1996); *Cooper v. Texaco, Inc.*, 961 F.2d 71, 72 (5th Cir. 1992); *Town of Islip v. Eastern Air Lines, Inc.*, 793 F.2d 79, 83 (2d Cir. 1986); *Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 927-28 (D.C. Cir. 1982).

Although the Eleventh Circuit below duly recited the settled rule that a litigant cannot be held in contempt for violating a court order that is not "'clear, definite and unambiguous,'" App. at 12a (quoting *United States v. Koblitz*, 803 F.2d 1523, 1527 (11th Cir. 1986)), the Court proceeded to turn that rule on its head. The existence of a court order of sufficient clarity to support a judgment of contempt, the Court declared, is a question of *fact* rather than of *law*. *See id.* at 11a-12a. Accordingly, the Court held, the appropriate standard of

review on appeal was the deferential sufficiency-of-the-evidence standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), whereby "the evidence is to be viewed, and all credibility issues to be decided, in the light most favorable to the charge, and all reasonable inferences drawn in support of a guilty verdict." *Id.* at 12a. *See also id.* at 18a ("For present purposes, it is enough to view all of the evidence, make all of the credibility determinations, and draw all of the reasonable inferences *in favor of the contempt charge*.") (emphasis added). It was up to a factfinder on remand, the Court concluded, to decide whether any discovery order in *Bush Ranch* had required DuPont to produce the Alta raw data and, if so, whether any such order was sufficiently clear to support a contempt charge. *See id.* at 12a, 18a-19a.

The Eleventh Circuit's holding that the interpretation of a court order for purposes of contempt is a factual rather than a legal question, as well as its importation of the *Jackson* standard of review into this context, is untenable as a matter of law or logic. The meaning of a court order is a question of law, not fact, and thus subject to *de novo* review on appeal. Indeed, the meaning of a court order is a *quintessential* question of law. A court order is a legal instrument; it quite literally *is* law. If, as a matter of law, the scope of a discovery order is unclear, indefinite, or ambiguous, the result is that *no contempt sanctions can be imposed*—not that the issue goes to a jury. Needless to say, the deferential *Jackson* standard, whereby any ambiguity in an order is construed *against* an alleged contemnor, is inherently inconsistent with the hitherto "unbroken lines of authority" holding that any ambiguity in an order is to be construed *in favor* of an alleged contemnor, *NBA Properties*, 895 F.2d at 32.

The Eleventh Circuit's counter-intuitive holding that the interpretation of a court order is a question of *fact* for contempt purposes also has far-reaching practical implications. That holding effectively nullifies the traditional strict constraints on

the judicial contempt powers: a fact-based approach to contempt, in contrast to a law-based approach, is inherently open-ended. The decision thus would subject a litigant to the threat of civil or criminal contempt sanctions based on a lay jury's untutored interpretation of court orders. Indeed, the Eleventh Circuit made no pretense of suggesting that such an interpretation would be constrained by the legal context provided by the Federal Rules of Civil Procedure, pertinent case law, or local practice. To the contrary, in explaining how a factfinder might "reasonably" find DuPont guilty of criminal contempt, the Court glossed over the strict limitations on expert discovery set forth in the Federal Rules at the time of *Bush Ranch*. *See* Fed. R. Civ. P. 26(b)(4) (pre-1993 amendments). Rather than looking to the Rules, the Court declared, a reasonable juror might instead look to the "inten[tions] and desire[s]" of the *Bush Ranch* plaintiffs in propounding their discovery requests. App. at 13a.

The Eleventh Circuit's holding that the interpretation of a court order for purposes of contempt is a question of fact, and its consequent application of the *Jackson* standard of review, also creates a clear conflict among the federal courts of appeals. Other circuits assess the clarity and scope of a court order as a matter of law; rather than attempting to discern how a "reasonable finder of fact" might interpret a court order, these courts instead review the clarity and scope of the relevant orders *de novo* to determine whether they are sufficiently clear to support a contempt judgment.

Thus, for example, in *Harris v. City of Philadelphia*, 47 F.3d 1333, 1340 n.5 (3d Cir. 1995), the Third Circuit held that whether an order is clear enough to "confor[m] to legal requirements [for contempt] is a question of law over which we retain plenary review." Similarly, in *United States v. O'Quinn*, 913 F.2d 221, 222 (5th Cir. 1990), the Fifth Circuit, treating the question as a matter of law, reversed a contempt judgment because "the order said to have been violated was too vague

and overbroad to support a judgment of criminal contempt." And the Sixth Circuit, in *Downey v. Clauder*, 30 F.3d 681, 686 (6th Cir. 1994), held on *de novo* review that the order before it could not support contempt because it was "hardly a model of clarity."[2] These cases, and those cited in the margin, are but a few representative examples of the innumerable authorities (including those cited *supra* at p. 11) that have applied the traditional and commonsense rule that the interpretation of court orders for contempt purposes is a question of law subject to *de novo* review on appeal.

III. The Eleventh Circuit Erred by Holding that Criminal Contempt Sanctions May Be Imposed in this Case Based on the Alleged Violation of a Discovery Duty Created After the Conclusion of the *Bush Ranch* Litigation.

Further compounding the error of remanding this case for possible criminal prosecution under a fact-based contempt standard, the Eleventh Circuit went on to hold that a reasonable factfinder could find DuPont guilty of criminal contempt based on the alleged violation of a discovery duty created *after* the conclusion of the *Bush Ranch* litigation. That astonishing

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[2] *Accord Gates v. Shinn*, 98 F.3d 463, 472 (9th Cir. 1996) (holding, on *de novo* review, that order was insufficiently specific to support contempt because "reasonable minds can and do differ as to whether the defendant's outpatient plan provided for 'appropriate psychiatric treatment'"); *Grace v. Center for Auto Safety*, 72 F.3d 1236, 1241 (6th Cir. 1996) (holding that court order could not support contempt "as a matter of law" because it did not "clearly and unambiguously" prohibit allegedly contumacious conduct); *Fonar Corp. v. Deccaid Servs., Inc.*, 983 F.2d 427, 429-30 (2d Cir. 1993) (holding on *de novo* review that order was "unclear" and thus could not support contempt); *Hess v. New Jersey Trans. R. Ops., Inc.*, 846 F.2d 114, 116 (2d Cir. 1988) (holding, on *de novo* review, that an order to make a "'*bona fide* offer of settlement'" is too "vague and imprecise" to support contempt); *United States v. Joyce*, 498 F.2d 592, 596 (7th Cir. 1974) (reversing contempt judgment after holding, on *de novo* review, that order was "vague and ambiguous in its language and direction").

endorsement of retroactive criminal liability flouts bedrock norms of Anglo-American jurisprudence. Accordingly, this Court's review is warranted to clarify not only the appropriate substantive and procedural standards for contempt, but also the proper application of those standards in this case.

To support its conclusion that a reasonable factfinder could find DuPont guilty of criminal contempt, the Eleventh Circuit outlined the following chain of reasoning: (1) the *Bush Ranch* plaintiffs' first request for production of documents, dated March 3, 1992, was "very broad," and could be construed to encompass the Alta raw data, App. at 12a, and (2) the District Court overruled DuPont's objections to that request, *see id.* at 14a, and (3) Federal Rule of Civil Procedure 26(e) imposes an ongoing duty to supplement discovery responses with material, like the Alta raw data, generated *after* a discovery request, *see id.* at 14a n.8. Each link in this chain is manifestly deficient. As a result, there is no basis here for criminal contempt as a matter of law.

First, the Eleventh Circuit erred by holding that the *Bush Ranch* plaintiffs' first request for production of documents could reasonably be construed to encompass the Alta raw data. *See* App. at 12a-13a. Under basic rules of trial practice, *expert* discovery is governed by different standards than *general* discovery, and discovery from *testifying* experts is governed by different standards than discovery from *non-testifying* experts. Thus, the 1970 version of Federal Rule of Civil Procedure 26(b)(4)—which governed discovery in *Bush Ranch*—flatly prohibited *any* discovery of materials generated by a non-testifying expert like Alta without a showing of "exceptional circumstances" and a specific court order. *See* Fed. R. Civ. P. 26(b)(4)(B) (1970) (reproduced at App. 113a-114a);[3]

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[3] The relevant provision read as follows: "A party may discover facts known or opinions held by an expert who has been retained or specially

(continued...)

Hoover v. Department of Interior, 611 F.2d 1132, 1142 (5th Cir. 1980). That rule was reflected in *Bush Ranch* in the guidelines for expert discovery established at the June 1, 1993, pretrial conference (which limited expert discovery to materials on which testifying experts relied), as well as the discovery practices of both parties.[4]

Remarkably, the Eleventh Circuit brushed aside DuPont's reliance on Rule 26(b)(4)(B) with the glib observation that "[t]here is no phrase in the request for document production suggesting that the plaintiffs *intended or desired* for the request to be limited to documents produced by testifying experts or by non-experts." App. at 13a-14a (emphasis added). Any such limitation, of course, would have been wholly superfluous—indeed, inexplicable—in light of governing law.

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[3] (...continued)
employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." This provision was not substantively altered by amendments made in 1993.

[4] Thus, for example, the *Bush Ranch* plaintiffs did not produce raw data generated by their testifying expert Dr. Ronald Mitchum or data on which another testifying expert, Dr. John White, claimed he had not relied. *See* DuPont's Response to Order to Show Cause and to Petition at Exh. 32 (Mitchum); Exh. 38 (White) (hereinafter "DuPont's Response"). Indeed, the *Bush Ranch* plaintiffs' first request for production of documents recognized the distinction between general and expert discovery by directing a specific interrogatory to materials on which DuPont's testifying experts planned to rely. *See* Plaintiffs' First Interrogatories to Def. DuPont, at 28 (Mar. 18, 1992) (attached as Exh. 60 to DuPont's Response). In response to that interrogatory, DuPont explained that it had "not yet selected any expert witness to testify at trial," and that "[t]o the extent, if any, this interrogatory requests information regarding experts *not* designated as trial witnesses, it is objectionable under Fed. R. Civ. P. 26[(b)](4)." DuPont's Response to Plaintiffs' First Set of Interrogatories, at 76 (May 1, 1992) (emphasis added) (attached as Exh. 60 to DuPont's Response).

In any event, a litigant's subjective "intentions" or "desires" do not define its opponent's discovery obligations.

Second, the Eleventh Circuit erred by holding that the District Court's order of June 24, 1992, overruling DuPont's objections to the *Bush Ranch* plaintiffs' first request for production of documents, could reasonably be construed as a "clear, definite, and unambiguous" order to produce the Alta data. *See* App. at 14a. A blanket order directing a litigant to comply with sweeping discovery requests is the very *antithesis* of a "definite" order. *Cf. R.W. Int'l Corp. v. Welch Foods, Inc.*, 937 F.2d 11, 17 (1st Cir. 1991) (general order to respond to discovery too vague even for Rule 37(b) discovery sanctions). Were the law otherwise, courts could enter sweeping orders that would automatically render any shortcoming in discovery responses grounds for contempt.

Third, the Eleventh Circuit erred by holding that the *Bush Ranch* plaintiffs' first request for production of documents could reasonably be construed to encompass the Alta raw data, which did not even exist until June 1993, more than a year *after* that request. *See* App. at 14a n.8. While acknowledging that "one might intuitively think that the request for production contains an *implicit* limitation to documents produced on or before the date the request for production was issued," *id.* (emphasis in original), the Eleventh Circuit held that DuPont had a duty under Federal Rule of Civil Procedure 26(e) to supplement its discovery responses. That duty, however, was created by an amendment to Rule 26(e) that did not take effect until December 1, 1993—well *after* the *Bush Ranch* litigation had been dismissed with prejudice.[5] *See* 28 U.S.C.A. Rule 26

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[5] The Eleventh Circuit also resorted again to the *Bush Ranch* plaintiffs' subjective intentions, noting that "there is no phrase in the request suggesting that the plaintiffs *intended or desired* the request to be limited to documents in existence on or before the date DuPont received the document

(continued...)

(noting effective date). The version of Rule 26(e) in effect during *Bush Ranch* contained no such duty. To the contrary, that version of the Rule provided that, subject to certain exceptions not applicable here, a party "is under *no duty* to supplement [a discovery] response." Fed. R. Civ. P. 26(e) (1970) (emphasis added).

The Eleventh Circuit thus applied the 1993 amendment to Rule 26(e) *retroactively* to subject DuPont to what the Court itself described as a risk of "serious criminal contempt sanctions." App. at 11a. In so doing, the Eleventh Circuit contravened centuries of settled law on the retroactivity of statutes, *see, e.g., Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1505 (1994); *United States v. Heth*, 3 Cranch (7 U.S.) 399, 413 (1806), as well as the Ex Post Facto Clause, *see, e.g., Miller v. Florida*, 482 U.S. 423, 429 (1987); *Calder v. Bull*, 3 Dall. (3 U.S.) 386, 390 (1798) (Opinion of Chase, J.).[6]

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[5] (...continued)
request." App. at 14a (emphasis added). It is hornbook law, however, that under the version of Rule 26(e) in effect during *Bush Ranch*, a document request could *not* create its own duty to supplement. Rather, the Rule made "it as clear as language possibly can that Rule 26(e) is the *exclusive authority* for requiring supplementation" and that "[t]he party [seeking discovery] may not expand the duty to supplement by a preamble to his request." 8 C. Wright & A. Miller, Federal Practice & Procedure § 2049, at 322 (1970) (emphasis added).

[6] Although DuPont highlighted this glaring error in its Petition for Rehearing with Suggestion for Rehearing *En Banc*, the Eleventh Circuit refused to correct (or even acknowledge) it. That Court should not be allowed to place itself above the law. Accordingly, even if this Court were not inclined to grant plenary review on the merits, it should at the very least summarily reverse the judgment to the extent it is based on a retroactive application of the 1993 amendments to Rule 26(e).

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted. In the alternative, the decision below should be summarily reversed.

Respectfully submitted,

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May 8, 1997

APPENDICES

[Filed - October 17, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9059

D.C. Docket No. 4:95-CV-36 (JRE)

IN RE: E. I. DU PONT DE NEMOURS & COMPANY—
BENLATE LITIGATION.

THE BUSH RANCH, INC., WILLIAM R. LAWSON, individually, YELLOW RIVER GROWERS, C. RAKER & SONS, INC., a Michigan corporation,

Petitioners-Counter-Defendants, Appellees,

C. NEAL POPE, a Georgia resident,
POPE, MCGLAMRY, KILPATRICK & MORRISON, a Georgia partnership,

Counter-Defendants,

versus

E. I. DU PONT DE NEMOURS & COMPANY, a Delaware corporation,

Respondent-Counterclaimant, Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(October 17, 1996)

BEFORE DUBINA and CARNES, Circuit Judges, and FARRIS*, Senior Circuit Judge.

DUBINA, Circuit Judge:

This case involves an appeal from a contempt order entered by the district court against the Defendant-Appellant E.I. Du Pont de Nemours & Company ("DuPont"). For the reasons that follow, we reverse the district court's order and remand the case for further proceedings.

I. Background

This appeal has its origins in four consolidated cases, known collectively as the *Bush Ranch* litigation, that were tried before the district court in 1993. The primary issue at trial was whether Benlate 50 DF—a fungicide manufactured by DuPont and sold to the plaintiffs for use at their nurseries—was contaminated with highly toxic herbicides known as sulfonylureas ("SUs"). After the case was submitted to the jury, the plaintiffs in the *Bush Ranch* litigation offered to settle their claims, and DuPont agreed. Accordingly, on August 16, 1993, the plaintiffs in the *Bush Ranch* litigation voluntarily dismissed their claims with prejudice.

After the settlement, the plaintiffs in a Hawaii Benlate case requested documents related to testing of Benlate 50 DF from the *Bush Ranch* litigation. DuPont resisted, but it eventually produced the documents pursuant to a court order. Among the test documents produced in the Hawaii Benlate case were certain raw test data (the "Alta data") that DuPont had not produced during the course of the *Bush Ranch* litigation. The Alta data included analytical findings which some experts would construe as evidence that Benlate 50 DF was contaminated with SUs.

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* Honorable Jerome Farris, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

As a result of the production of the Alta data in the Hawaii Benlate case, the Appellees[1] returned to the district court—more than a year and a half after the settlement of the *Bush Ranch* litigation—with a petition seeking sanctions against DuPont. The Appellees charged that DuPont had intentionally withheld evidence of SU contamination which was in its possession and which the district court had ordered it to produce. Furthermore, the petition charged that DuPont had falsely represented to the district court and to the Appellees that the Alta data it withheld contained no evidence of SU contamination. In response to the petition, the district court set a hearing date and ordered DuPont to appear and show cause why it should not be sanctioned.

DuPont filed a motion to recuse under 28 U.S.C. §§ 144 and 455, a motion to vacate the show cause order, and a motion to dismiss the Appellees' petition. The district court denied each of these motions and also dismissed DuPont's counterclaims against the Appellees. Following the district court's denial of the motion to recuse, DuPont filed a motion to stay the proceedings to enable it to seek writs of prohibition and mandamus from this court. The district court denied the motion to stay the proceedings, and this court subsequently denied DuPont's emergency motion for a stay and its petitions for writs of prohibition and mandamus.

The show cause hearing began on May 2, 1995, and continued through May 12, 1995. On the basis of the evidence presented at the hearing, the district court issued an order finding that DuPont's failure to produce the Alta data had violated its discovery orders in the *Bush Ranch* litigation. The district court specifically found that "DuPont deprived [the Appellees], the [district court], and the jury of data and

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[1]The Appellees are the plaintiffs from three of the four cases consolidated in the original *Bush Ranch* litigation. Specifically, the Appellees consist of The Bush Ranch, Inc., William R. Lawson, Yellow River Growers, Roy Phillip Barber, Carol H. Barber, and C. Raker & Sons, Inc.

documents highly relevant to the issue which DuPont itself described as the most critical issue in the case." *In re E.I. du Pont de Nemours & Co.*, 918 F.Supp. 1524, 1556 (M.D.Ga.1995). The district court also found that DuPont's conduct was "willful, deliberate, conscious, purposeful, deceitful, and in bad faith;" that this deceitful conduct "affected the rulings and the orders of [the district court] and interfered with the administration of justice;" and that this discovery abuse rendered the trial, which had lasted approximately six weeks, "a farce." *Id.*

Accordingly, the district court entered a sanctions order against DuPont consisting of the following four components:

(1) The district court directed DuPont to send copies of the sanctions order and the withheld documents to the Appellees and the rest of the plaintiffs in the *Bush Ranch* litigation.

(2) The district court found that the plaintiffs in the *Bush Ranch* litigation had together expended $6,843,837.53 in preparation for the trial and assessed a sanction in that amount against DuPont. The district court assessed another sanction for the same amount against DuPont to pay for the "wasted time, inconvenience, and waste of judicial resources inflicted upon [the district court] and the jury for the pretrial and trial of the consolidated cases." *Id.* at 1557. The district court ordered that the total sum—$13,687,675.06—be paid into the registry of the court.

(3) The district court partially vacated the order entered upon settlement of the *Bush Ranch* litigation, thereby reinstating several orders finding discovery abuses by DuPont during the course of the trial. The district court specifically reinstated a conditional $1 million sanction it had imposed upon DuPont during

the trial. The district court also assessed a sanction of $100 million against DuPont for its conduct during the previous litigation and during the show cause hearing. The district court announced that it would permit DuPont to purge itself of the $1 million and $100 million sanctions by complying with all other sanctions orders and by publishing a full page advertisement in the *Wall Street Journal* and in the most widely circulated newspapers in Alabama, Georgia, and Michigan acknowledging its wrongdoing and giving notice of the district court's orders and sanctions. The form of the advertisement was to be submitted to the district court for its approval.

(4) The district court ordered DuPont to file, within 25 days, a certificate of compliance signed by DuPont's chief executive officer confirming that DuPont was in full compliance with the terms of the sanctions order. The district court warned DuPont that it would impose additional sanctions of $30,000 a day for each day after the termination of the 25-day grace period during which DuPont had not both fully complied with the sanctions order and filed the requisite certificate of compliance.

DuPont requested a stay of the sanctions order to enable it to appeal to this court. The district court granted the stay, and this appeal followed.

II. Issues Presented

In its effort to defeat the contempt order, DuPont presents three issues which we must discuss in order to decide

this appeal.[2] First, DuPont argues that the district court lacked jurisdiction to entertain the proceedings which culminated in the issuance of the contempt order. Second, DuPont contends that the district court erred in imposing criminal contempt sanctions in a civil proceeding.[3] Third, DuPont claims that its failure to produce the Alta data violated no order of the district court.

III. Standards of Review

We review the district court's assertion of jurisdiction *de novo*. *See Mutual Assurance, Inc. v. United States,* 56 F.3d 1353, 1355 (11th Cir.1995). We also review *de novo* the district court's characterization of these proceedings as civil, and not criminal, in nature. *See International Union, United Mine Workers of America v. Bagwell,* ___ U.S. ___, ___, 114 S.Ct. 2552, 2561-63, 129 L. Ed.2d 642 (1994); *Martin v. Guillot,* 875 F.2d 839, 845 (11th Cir.1989). As will be discussed *infra*, DuPont's challenge to the existence of an order requiring production of the Alta data presents a question of evidence sufficiency which we review *de novo*. *See United States v. Keller,* 916 F.2d 628, 632 (11th Cir.1990), *cert. denied,* 499 U.S. 978, 111 S. Ct. 1628, 113 L. Ed.2d 724 (1991).

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[2]We do not address the remaining issues raised by the parties, because our resolution of these first three issues is dispositive of this appeal.

[3]The district court invoked several sources of authority for imposing sanctions on DuPont. *See In re E.I. du Pont de Nemours & Co.*, 918 F.Supp. at 1540-41. However, we are persuaded that none of these sources of authority could support the sanctions order without the assistance of the district court's inherent contempt power—a fact that the Appellees themselves recognize. *See* Appellees' Br. at 24 ("Having jurisdiction, *and because no single rule was up to the task*, the [district court] properly relied on its inherent powers to sanction DuPont.") (emphasis added). Thus, we need examine only the constitutionality of the district court's exercise of its inherent contempt power to determine whether the sanctions order can stand.

IV. Discussion

A. Jurisdiction.

DuPont argues that the district court "lacked jurisdiction to entertain an independent civil action for sanctions based on alleged misconduct in the long-dismissed *Bush Ranch* litigation." DuPont's Br. at 17. We disagree. Every district court "has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S. Ct. 2123, 2132, 115 L. Ed.2d 27 (1991) (citing *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946)). In addition, the district court was free to vacate its earlier judgment, in whole or in part, and to resume proceedings on the same jurisdictional basis as it possessed in the underlying case. *See Chambers*, 501 U.S. at 44 ("Of particular relevance here, the inherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court.") (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (19[4]4); *Universal Oil*, 328 U.S. at 580). For this reason, the Supreme Court has specifically held that "[a] court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S. Ct. 2447, 2456, 110 L. Ed.2d 359 (1990) (citations omitted). Thus, we conclude that the district court possessed jurisdiction to conduct the challenged proceedings.

B. Nature of the Sanctions.

DuPont contends that the district court committed reversible error in imposing criminal sanctions in a civil proceeding. It is indisputable that the district court did not afford DuPont the procedural protections the Constitution

requires for the imposition of criminal contempt sanctions.[4] Thus, the proceedings were civil in nature, and DuPont's entitlement to relief on appeal turns on our characterization of the contempt order as being either civil or criminal in nature. *See Blalock v. United States,* 844 F.2d 1546, 1560 n.20 (11th Cir.1988) (per curiam) (Tjoflat, J., specially concurring) ("It requires no citation of authority to say that a district court may not, even unwittingly, employ a civil contempt proceeding to impose what, in law, amounts to a criminal contempt sanction. . . . When a district court employs civil contempt procedures to punish a contemner, it necessarily deprives the contemner of his constitutional rights and renders his contempt citation a nullity.").

The Supreme Court has instructed that "conclusions about the civil or criminal nature of a contempt sanction are properly drawn, not from the subjective intent of [the court imposing the sanction], but from an examination of the character of the relief itself." *International Union, United Mine Workers of America v. Bagwell,* ___ U.S. ___, ___, 114 S.Ct. 2552, 2557, 129 L. Ed.2d 642 (1994) (citation and internal quotation marks omitted). If the relief is designed to

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[4]The Supreme Court summarized these requirements in the following passage:

> [T]his Court has found that defendants in criminal contempt proceedings must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves; must be advised of charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses; must be given a public trial before an unbiased judge; and must be afforded a jury trial for serious contempts.

Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 798-99, 107 S. Ct. 2124, 2133, 95 L. Ed.2d 740 (1987) (citing *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 31 S. Ct. 492, 55 L. Ed. 797 (1911); *Cooke v. United States,* 267 U.S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1925); *In re Oliver,* 333 U.S. 257 (1948); and *Bloom v. Illinois,* 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed.2d 522 (1968)).

compensate a complainant for losses or to coerce a party into complying with a court order, the contempt sanction is civil in nature. *See id.*, 114 S.Ct. at 2558; *Martin v. Guillot,* 875 F.2d 839, 845 (11th Cir.1989). By contrast, "if a court seeks to vindicate its authority by punishing a contemnor, then [the] contempt is criminal in nature." *Martin*, 875 F.2d at 845 (citations omitted). Thus, we must determine whether the specific sanctions ordered by the district court were compensatory and coercive in nature, or instead were punitive in nature.

We have little trouble concluding that the sanctions the district court imposed were overwhelmingly punitive—and thus criminal—in nature. First, there was no compensatory aspect to the contempt order. The only provision even arguably geared toward compensation of the parties was the first command that DuPont pay a sum of $6,843,837.53. Although the district court chose this figure because it represented the cost to the plaintiffs in preparing for and conducting the underlying trial, the district court did not order that this sum be paid to the Appellees or to any of the other plaintiffs in the original *Bush Ranch* litigation. Instead, the district court ordered the sum to be paid into the registry of the court. The Supreme Court has provided few "straightforward rules" for distinguishing between civil and criminal contempts, *Hicks ex rel. Feiock v. Feiock,* 485 U.S. 624, 631-32, 108 S. Ct. 1423, 1429, 99 L. Ed.2d 721 (1988), but it has held that "[i]f the relief provided is a fine, it is remedial [and thus civil in nature] when it is paid to the complainant, and punitive when it is paid to the court. . . ." *Id.*, 485 U.S. at 632. Thus, under *Hicks*, this portion of the sanctions order must be characterized as punitive in nature.

Second, there was no coercive aspect to the district

court's contempt order.[5] At the time the district court entered the contempt order, DuPont could no longer comply with the discovery orders because the *Bush Ranch* litigation had terminated. Although the district court did have the power to set aside the settlement agreement and re-open the discovery portion of the earlier case, *see Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S. Ct. 2123, 2132, 115 L.Ed.2d 97 (1991), it chose not to do so. Where "the contemnor [can] not avoid the sanction by agreeing to comply with the original order to produce the documents," the sanctions order is determinate and therefore criminal in nature.[6] *Hicks,* 485 U.S. at 634 n. 6.

We are persuaded that the sanctions imposed by the district court were neither compensatory nor coercive in nature, but instead were designed to punish DuPont for flouting the authority of the district court. Accordingly, even though DuPont and its counsel may very well have engaged in

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[5]The final section of the contempt order was clearly intended to coerce DuPont into complying with the order's three other sections. Thus, when considered in isolation, this part of the order could be characterized as a coercive civil sanction. However, because it was intended to coerce compliance with the other sanctions, which were punitive in nature, it must fall with the rest of the contempt order. *See Hicks,* 485 U.S. at 638 n. 10 ("[I]f *both* civil and criminal relief are imposed in the same proceeding, then the criminal feature of the order is dominant and fixes its character for purposes of review.") (citations and internal quotation marks omitted).

[6]There is an exception to the general rule that determinacy of sanctions renders them criminal rather than civil in nature, and the Appellees argue that the exception applies in this case. In *Hicks*, the Court stated that "[i]f the relief imposed . . . is in fact a determinate sentence with a purge clause, then it is civil in nature." *Hicks*, 485 U.S. at 640 (citations omitted). The Appellees claim that the $1 million and $100 million sanctions contained in the third part of the contempt order are civil in nature because, even though determinate, DuPont was free to purge them by taking out ads in several newspapers confessing wrongdoing. But this publication option was itself neither compensatory nor coercive, but instead was punitive in nature. When a party must choose between two sanctions that are both punitive in nature, the character of the ultimate relief will necessarily be punitive.

criminal acts,[7] we must reverse the contempt order because the district court did not afford DuPont the procedural protections the Constitution requires for the imposition of criminal contempt sanctions.

C. Violation of an Order.

DuPont claims that it "cannot be held in contempt for failing to produce the Alta [data] for the simple reason that there was no order requiring [their] production." DuPont's Br. at 17. If DuPont is correct in its assertion that it was never ordered to produce the Alta data, then it cannot be held in contempt for failing to produce the Alta data during the *Bush Ranch* litigation. Since a ruling on this issue will either confirm or remove permanently a risk of the imposition of serious criminal contempt sanctions against DuPont, we now turn to a discussion of whether the evidence that DuPont was ever ordered to produce the Alta data is sufficient to allow this case to proceed further.

As previously explained, the sanctions imposed by the district court were criminal in nature. In the context of criminal contempt, the existence *vel non* of an order is a question for the finder of fact. *See United States v. Turner,* 812 F.2d 1552, 1563 (11th Cir.1987) (listing, as one of the essential elements of criminal contempt, a finding that the district court "entered a lawful order of reasonable specificity"); *see also In re McDonald,* 819 F.2d 1020, 1024 (11th Cir.1987) (holding that whether an order is reasonably specific is a question of fact which must be proven beyond a reasonable doubt to sustain a conviction for criminal contempt). Thus, in order to grant DuPont's request that we declare at this stage of the proceedings that no order requiring production of the Alta data existed, we would have to find that the record contains

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[7]In light of the serious nature of the allegations against DuPont and its counsel, we assume that the appropriate United States Attorney will shortly begin an investigation of this matter (if he or she has not already done so).

insufficient evidence to enable a reasonable finder of fact t
conclude beyond a reasonable doubt that the district cou
entered a lawful order of reasonable specificity requirin
DuPont to produce the Alta data. An order meets th
"reasonable specificity" requirement only if it is a "clea
definite, and unambiguous" order requiring the action i
question. *See, United States v. Koblitz,* 803 F.2d 1523, 152
(11th Cir.1986); *Jordan v. Wilson,* 851 F.2d 1290, 1292 n.
(11th Cir.1988); *see also Int'l Longshoremen's Ass'n*
Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (196
(union could not be held in contempt for violating order whic
did not clearly apply to union).

Mindful of this standard, and having undertaken
thorough review of the record, we cannot agree with DuPon
that there is insufficient evidence from which a reasonabl
finder of fact could conclude that there was a reasonabl
specific order requiring DuPont to produce the Alta data. I
reaching this conclusion, we have applied the familiar doctrin
that the evidence is to be viewed, and all credibility issues to b
decided, in the light most favorable to the charge, and a
reasonable inferences drawn in support of a guilty verdict. *See*
e.g., Jackson v. Virginia, 443 U.S. [307], 319 (1979); *Unite*
States v. Starrett, 55 F.3d 1525, 1541 (11th Cir.1995); *Unite*
States v. Perez, 956 F.2d 1098, 1101 (11th Cir.1992). O
course, we do not mean, by our ruling on this issue, t
predetermine the outcome of the criminal contempt proceedin
More specifically, we do not mean to intimate that n
reasonable finder of fact could have a reasonable doubt abou
the existence of a sufficiently specific order. Rather, w
merely hold that the record contains sufficient evidence fro
which a reasonable finder of fact *could* find beyond
reasonable doubt that DuPont was ordered to produce the Alt
data. We turn now to a discussion of that evidence.

The plaintiffs' first request for document productio
was very broad. In it, DuPont was asked to produce, *inter alia*

> All documents reflecting, referencing, and/or relating to any analytical findings (including identification of peaks) from mass spectrometry [and] high performance liquid chromatography . . . . in any way relating to the use and/or administration of Benlate 50 DF;
>
> * * * *
>
> all documents reflecting, referencing, and/or relating to any assays . . . conducted, in whole or in part, for the purpose of determining the presence, if any, of any sulfonylurea compound in Benlate 50 DF; [and]
>
> * * * *
>
> all documents relating to and/or referencing any report or finding from any person, or entity, whether or not employed by the defendant, of other pesticidal compounds, including, but not limited to, herbicides, in Benlate 50 DF.

Plaintiffs' First Request for Production of Documents to Defendant E.I. du Pont de Nemours & Company ¶¶ 18, 55, and 65. The Alta data consist of documentation of the results of liquid chromatography testing which was done to detect the possible presence of Benlate 50 DF in soils taken from the plaintiffs' nurseries. Thus, the request for production of documents would appear to cover the Alta data. Nevertheless, DuPont argues that this request for production of documents could not include the Alta data, both because the district court treated materials generated by non-testifying experts differently from materials generated by testifying experts and non-experts, and because the Alta data were generated long after the first request for production of documents was prepared. These arguments are not strong enough to establish DuPont's position as a matter of law; a reasonable factfinder could reject them.

There is no phrase in the request for document production suggesting that the plaintiffs intended or desired for

the request to be limited to documents produced by testifying experts or by non-experts. In addition, there is no phrase in the request suggesting that the plaintiffs intended or desired the request to be limited to documents in existence on or before the date DuPont received the document request.[8] Thus, a reasonable finder of fact could conclude beyond a reasonable doubt that this request, on its face, covered the Alta data.

DuPont raised a number of objections to this request for production, each of which was subsequently overruled by the district court. In particular, DuPont claimed that it was not required to turn over the requested documents because the discovery request sought "information or materials which have been gathered or prepared in anticipation of or in the course of litigation, or which otherwise is subject to [the] work-product doctrine." Memorandum Opinion and Order on Plaintiffs' Motion to Compel Discovery Dated June 24, 1992, at 3. The district court noted that DuPont had failed to make timely and specific claims of privilege and specifically overruled DuPont's "objections to producing documents involving Benlate claims

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[8]Although one might intuitively think that the request for production contains an *implicit* limitation to documents produced on or before the date the request for production was issued, there is the following language in Rule 26:

> A party who has . . . responded to a request for discovery with a disclosure or response is under a *duty to supplement or correct* the disclosure or response to *include information thereafter acquired* if ordered by the court or in the following circumstances:
>
> > (1) . . . if the party learns that in some *material respect* the information disclosed is *incomplete or incorrect* and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Fed.R.Civ.P. 26(e) (emphasis added). Thus, when a party generates responsive documents which render incomplete or incorrect earlier disclosures, it has an obligation to inform the opposing party of the new material.

and lawsuits and *tests that Defendant has conducted since March, 1991*." *Id.* at 17 (emphasis added). Nevertheless, the district court reserved ruling on DuPont's claims of work product protection to give DuPont yet another opportunity to present adequately its claims of privilege on or before June 30, 1992. In addition, the district court specifically ordered DuPont to go back and review the plaintiffs' first request for production of documents and to answer each request fully within 15 days from the date of the district court's order. *See id.* at 18.

On June 30, 1992, DuPont filed a 498-page privilege log with the district court listing documents that it wanted to withhold on grounds of attorney-client privilege and/or the work product doctrine. *See* Supplemental Order Dated September 25, 1992, at 3. DuPont also noted its intention to withhold four categories of documents that were not individually logged. One of these categories of non-individually logged documents was described as "documents generated during ongoing testing conducted in 1992 by defendant with outside experts retained to evaluate crop damage claims and to determine the causes of damage." *Id.* The district court then made the following statement:

> This Court concludes that defendant's expressed intent to raise additional claims of such privileges and protections, long after its responses to plaintiffs' first interrogatories and plaintiffs' first request for production were due and long after the June 30, 1992, date upon which this Court directed defendant to file a detailed log specifically setting forth any and all claims of attorney-client privilege and work-product protection, is contrary to applicable law as set forth above and in violation of this Court's directives.

Id. at 21. The district court further stated:

> [T]he Court has determined that management of these cases, consolidated for the purpose of discovery, must not be further delayed by the non-production of documents by this defendant, nor by a continued delayed filing of claims of attorney-client privilege and work-product protection. *The consequences to this defendant, if any, resulting from the rulings herein made, will result solely from the failure of this defendant to respond timely to the plaintiffs' discovery requests.*

Id. at 26 (emphasis added).

As a result of DuPont's refusal to review its documents and make adequate claims of work product protection, the district court issued an order to apply throughout the *Bush Ranch* litigation that no further claims of work product protection asserted by DuPont would be entertained unless DuPont made a showing of extraordinary need. *Id.* at 27-28 ("The matter here considered will be limited to *the question of the plaintiffs' first discovery requests* directed to the defendant and the question of whether the defendant, by its acts and conduct, has waived the right to file any further claims of attorney-client privilege or work-product protection as to individual documents responsive to those discovery requests. . . . Only an assertion of privilege by defendant upon a showing of extraordinary need will be hereafter considered.") (emphasis added). Thus, a reasonable finder of fact could conclude beyond a reasonable doubt that the district court, by order, specifically altered the general process contained in Rule 26 for addressing claims of work product protection relating to documents prepared by DuPont in anticipation of litigation.[9]

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[9]The procedure adopted by the district court—viz., requiring the non- producing party to identify documents withheld under a claim of work product protection before forcing the party seeking production to make a showing of substantial need for the documents—is substantially in line with an amendment to Rule 26 adopted shortly after the termination of the *Bush*

As a result of DuPont's abuse of the discovery process, the district court set up a special procedure for reviewing future work product claims by DuPont. A reasonable finder of fact could well conclude that DuPont's attorneys were clever enough to figure out the import of the district court's enunciated procedure for reviewing all future claims of work product protection in the case. Indeed, after the district court adopted this procedure, it specifically ordered DuPont to go back and review its responses to the plaintiffs' first request for document production and to fill in immediately "*all gaps* in documents responsive to Plaintiffs' original discovery requests." Order Imposing Sanctions Dated March 15, 1993, at 4 (emphasis added). Significantly, the Alta data were generated only a couple months after the district court issued its gap-filling order.

We do recognize that there is evidence in the record which *could* cause a factfinder to have a reasonable doubt about the existence of a clear, definite, and unambiguous order requiring DuPont to produce the Alta data. For example, DuPont points to a joint motion, signed by plaintiffs' lead counsel and submitted to the district court upon settlement of the case which states that "Plaintiffs have agreed that, during

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Ranch litigation. *See* Fed.R.Civ.P. 26(b)(5) ("When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."). Arguably, the content of subdivision (b)(5) was already implicit in the scheme of Rule 26 at the time of the *Bush Ranch* litigation. At any rate, the question before this court is not what the Federal Rules of Civil Procedure *required* DuPont to produce, but instead what a reasonable finder of fact could conclude that the district court *ordered* DuPont to produce. If the district court's order to produce the documents sought in the first request for document production was clear, then DuPont was not entitled to decide unilaterally to disregard the order simply because it did not track precisely the procedure set up in Rule 26.

the course of the case, DuPont did come in compliance with the Court's Orders and its discovery obligations." Joint Motion and Supporting Memorandum of Plaintiffs and Defendant for an Order Vacating Prior Discovery Orders and Sanctions Dated August 16, 1993, at 3. As noted by DuPont, it is undisputed that Neal Pope, the lead counsel for the plaintiffs, signed that joint motion at a time when he knew that the Alta data had not been turned over during the course of discovery. We agree with DuPont that Mr. Pope's written representation, as an officer of the court, that DuPont had complied with its discovery obligations is evidence in its favor. But it is not conclusive evidence.

A factfinder is entitled to make credibility determinations, and we are not prepared to rule out the possibility that a reasonable factfinder might find that, notwithstanding his obligations as an officer of the court, Mr. Pope's representations were less than literally true and were made as a matter of expedience to ensure the success of the settlement. We hope that expedience and deliberate misrepresentation is not the explanation; if, however, that turns out to be the case, the district court should take appropriate action. It may be that there is a satisfactory, innocent explanation for the inconsistency between Mr. Pope's representations to the district court on behalf of the plaintiffs in the settlement agreement, and the position plaintiffs have taken in this proceeding, but we leave that matter to further development upon remand. The district court should insist upon an explanation, and the factfinder can make the necessary credibility determinations about any explanation that is offered.

For present purposes, it is enough to view all of the evidence, make all of the credibility decisions, and draw all of the reasonable inferences in favor of the contempt charge. Doing that, we conclude that a reasonable finder of fact could conclude beyond a reasonable doubt that the plaintiffs' first request for production of documents covered the Alta data. In addition, a reasonable finder of fact could conclude beyond a

reasonable doubt that the district court overruled DuPont's objections to that request and ordered DuPont to produce the Alta data. In sum, we hold that a reasonable finder of fact could conclude beyond a reasonable doubt that the district court entered a lawful order of sufficient specificity commanding DuPont to produce the Alta data and that it willfully failed to obey that order.

V. Conclusion

For the foregoing reasons, we reverse the contempt order and remand this case to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

[Filed - December 26, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9059

IN RE: E. I. DU PONT DE NEMOURS & COMPANY—
BENLATE LITIGATION.

THE BUSH RANCH, INC., WILLIAM R. LAWSON, individually, YELLOW RIVER GROWERS, C. RAKER & SONS, INC., a Michigan corporation,

Petitioners-Counter-Defendants, Appellees,

C. NEAL POPE, a Georgia resident,
POPE, MCGLAMRY, KILPATRICK & MORRISON, a Georgia partnership,

Counter-Defendants,

versus

E. I. DU PONT DE NEMOURS & COMPANY, a Delaware corporation,

Respondent-Counterclaimant, Appellant.

On Appeal from the United States District Court
for the Middle District of Georgia

BEFORE: DUBINA, and CARNES, Circuit Judges, and FARRIS[1], Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant, E.I. Du Pont De Nemours & Company, is DENIED.

ENTERED FOR THE COURT:

/s/ JOEL F. DUBINA
UNITED STATES CIRCUIT JUDGE

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[1] Honorable Jerome Farris, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

[Filed - December 26, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9059

IN RE: E. I. DU PONT DE NEMOURS & COMPANY—
BENLATE LITIGATION.
THE BUSH RANCH, INC., WILLIAM R. LAWSON, individually, YELLOW RIVER GROWERS, C. RAKER & SONS, INC., a Michigan corporation,

Petitioners-Counter-Defendants, Appellees,

C. NEAL POPE, a Georgia resident,
POPE, MCGLAMRY, KILPATRICK & MORRISON, a Georgia partnership,

Counter-Defendants,

versus

E. I. DU PONT DE NEMOURS & COMPANY, a Delaware corporation,

Respondent-Counterclaimant, Appellant.

On Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: DUBINA, and CARNES, Circuit Judges, and FARRIS[1], Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ JOEL F. DUBINA
UNITED STATES CIRCUIT JUDGE

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[1] Honorable Jerome Farris, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

[Filed - November 4, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9059

IN RE: E. I. DU PONT DE NEMOURS & COMPANY—
BENLATE LITIGATION.

THE BUSH RANCH, INC., WILLIAM R. LAWSON, individually, YELLOW RIVER GROWERS, C. RAKER & SONS, INC., a Michigan corporation,

Petitioners-Counter-Defendants, Appellees,

C. NEAL POPE, a Georgia resident,
POPE, MCGLAMRY, KILPATRICK & MORRISON, a Georgia partnership,

Counter-Defendants,

versus

E. I. DU PONT DE NEMOURS & COMPANY, a Delaware corporation,

Respondent-Counterclaimant, Appellant.

On Appeal from the United States District Court
for the Middle District of Georgia

BEFORE DUBINA and CARNES, Circuit Judges, and FARRIS*, Senior Circuit Judge.

BY THE COURT:

For good cause, it is ORDERED that upon remand of this case to the United States District Court for the Middle District of Georgia that the chief judge of that district reassign all future proceedings in this action to a different district judge.

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* Honorable Jerome Farris, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE: E. I. du Pont de Nemours & Company—
Benlate Litigation.

THE BUSH RANCH, INC., a Georgia corporation, WILLIAM R. LAWSON, individually, YELLOW RIVER GROWERS, a partnership whose partners are Roy Phillip Barber, Carol H. Barber and Gregory Phillip Barber, and CAROL H. BARBER, and C. RAKER & SONS, INC., a Michigan corporation,

Petitioners

vs.

E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation,

Respondent.

CASE No. 4:95-CV-36 (JRE)

OPINION AND ORDER

ELLIOTT, District Judge.

A hearing which began on Tuesday, May 2, 1995, and ended on Friday, May 12, 1995, was conducted by the Court in connection with the matter above identified. Following the suggestion made by the Court, counsel for the respective parties have filed proposed findings of fact and conclusions of law. The Court now files this opinion in which the Court's findings of fact and conclusions of law, although not separately categorized, will be readily apparent. The Court will enter a separate order with respect to and deciding all motions of the Petitioners and of DuPont which are still pending.

The Petitioners in this matter are nurserymen who previously were among the named Plaintiffs in separate actions against E.I. du Pont de Nemours and Company (hereafter DuPont) tried as consolidated cases in this court. A total of 14 such actions were filed, and all of the cases were consolidated for the purposes of discovery prior to trial of the consolidated cases. At all times, however, the first four of those actions (the "Bush Ranch cases") clearly were the "lead" cases. The Plaintiffs in those cases contended that DuPont's product, Benlate 50DF, a fungicide, was defective and was contaminated with, among other things, highly toxic herbicides generically called sulfonylureas ("SUs"), manufactured, formulated and/or warehoused by DuPont at the same Belle, West Virginia, plant where benomyl, the active ingredient in Benlate 50DF, is manufactured. It was claimed that such SU-contaminated Benlate caused damages to the ornamental plants and the soils and waters of their nurseries. Therefore, the testing for the presence of SU contamination was the most critical evidence for both the Plaintiffs and the Defendant in the *Bush Ranch* cases.

This Petition to Show Cause was filed with the Court on March 22, 1995. The Petitioners, three of the four Plaintiffs in the original lead consolidated cases (hereafter "Bush Ranch" cases), are alleging that DuPont, through its conduct, engaged in acts of misrepresentation and concealment as to critical evidence which constituted a fraud on the Court and a contempt of the Court's orders. On reviewing the petition, as well as the memorandum appendix in support and attached Exhibits 1-75, this Court on March 23, 1995, entered an order directing DuPont to show cause on April 24, 1995, why it should not be sanctioned for the conduct described in the petition.

Among the motions filed by DuPont was a motion to recuse this District Court Judge before whom the wrongful conduct stated in the petition was alleged to have occurred. DuPont also filed motions to dismiss and to vacate the show

cause order. Thereafter, considering these motions, the Court continued the hearing to May 1, 1995, and, at the request of DuPont's counsel, the Court continued the hearing to May 2, 1995.

On April 26, 1995, the Court denied DuPont's motion to recuse. On April 28, 1995, the Court denied DuPont's motion to stay all proceedings pending review in the appellate court, that motion having been filed on April 27, 1995. DuPont then filed an emergency motion for stay in the United States Court of Appeals for the Eleventh Circuit on April 28, 1995, along with a petition for a writ of mandamus and a writ of prohibition. These motions were denied by the Court of Appeals on Monday, May 1, 1995. As already noted, the hearing on the show cause order began on Tuesday, May 2, 1995, and ended on Friday, May 12, 1995. The sole purpose of the hearing was to determine whether sanctions should be imposed on the Respondent DuPont.

The show cause order was issued following consideration of a petition and voluminous exhibits, which alleged that DuPont had committed a fraud on this Court in connection with discovery matters, trial conduct, and a post-settlement application to the Court to vacate previous sanctions orders. As set out in detail in this opinion, the Court finds and concludes that DuPont did commit the fraud, the discovery abuses, and the violations of this Court's orders averred in the petition. DuPont has failed to show any sufficient cause why it should not be sanctioned for the conduct detailed herein.

The Court has heard the testimony and has reviewed the documentary evidence. The Court takes judicial notice of all of the pleadings, submissions, hearing transcripts, orders, and trial transcripts in the *Bush Ranch* cases. The Court has observed the demeanor of the witnesses and considered any inconsistencies in the evidence. The Court has determined that evidence from other cases involving allegations that DuPont's Benlate 50DF caused damages, which evidence in most

instances consists of trial or deposition transcripts, court orders, or *in judicio* statements by DuPont, properly should be considered where it concerns what happened in *this* court, or where it concerns actions or positions taken by or on behalf of DuPont with respect to the Alta data and documents, or where it bears on the credibility of DuPont. The essentially identical conduct of DuPont in concealing and misrepresenting Alta tests and documents in other courts immediately after the *Bush Ranch* trial is, however, strong evidence of DuPont's intent and motive, and establishes a pattern of concealment and false representations on this crucial issue. That pattern of concealment has continued through the show cause hearing here.

It is without dispute that the core, almost the ultimate, issue in the *Bush Ranch* trials was whether or not the soils and or waters of the *Bush Ranch* Plaintiffs' lands where their nursery businesses were conducted were contaminated by the use of DuPont's Benlate product which itself was defective due to contamination by sulfonylureas ("SUs") which were also manufactured by DuPont. DuPont was confronted with hundreds of claims and lawsuits throughout the United States alleging damage by Benlate, thus establishing a significant economic risk for DuPont if Benlate was found to be defective through contamination. While there was much circumstantial and indirect evidence of SU-contamination, throughout the bulk of the pretrial discovery Plaintiffs had not been able to produce direct test results of their soils and waters. This was due principally to the fact that such testing could not generally be performed on scientific equipment available to Plaintiffs' experts. The Plaintiffs agreed to allow agents of DuPont onto their properties where their nurseries were located for the purpose of taking soil samples. The Defendant agreed, however, that in return for being allowed access to the soils, waters, and plants of the Plaintiffs for purposes of taking samples, DuPont would furnish Plaintiffs with all materials generated in connection with any tests conducted on those soil, water, and plant samples.

In an effort to bolster the defense contention that there were no SUs in Plaintiffs' soils or waters, DuPont engaged Alta Laboratories, Inc. (hereinafter "Alta") to perform sophisticated analytical chemistry tests, which few other laboratories, if any, in the country could perform. Although all materials generated in connection with such tests were to be furnished to Plaintiffs, both as a matter of discovery and pursuant to order of this Court, and as a matter of conditions made clear as a predicate to the entry of DuPont onto Plaintiffs' lands to obtain samples for these tests, the only documentary materials ever furnished were some tables or charts which the Defendant referred to and called "Summaries." Some of those summaries were given to Plaintiffs on the eve of trial. The remainder of them were not furnished until after Plaintiffs had rested their case and not until just before the Defendant was about to call its only witness through whom it would seek to elicit the information which was purportedly contained in the tables. It is the conduct of DuPont surrounding the preparation and use of these "summaries," when taken together with the conduct generally of the agents and attorneys of DuPont, which gives rise to many of the allegations of fraud upon the Court currently before the Court.

For a year preceding the Alta tests, the *Bush Ranch* Plaintiffs and DuPont had been engaged in a protracted series of discovery disputes, as the result of which this Court had repeatedly found DuPont to be in flagrant violation of discovery orders and duties. This Court had found Dupont's conduct to be the most serious abuse in its years on the bench and the most serious abuse reflected in the legal precedents. A conditional sanction of, first, $500,000.00, then $1,000,000.00 had been set, without, it is now clear, altering DuPont's conduct toward the Court, the civil justice system, or the opposing parties.

During the lengthy discovery period in this case this Court was forced by the obstructive practices of DuPont to hold numerous hearings. Those hearings took place on the

following dates: July 8, 1992; August 5, 1992; August 26, 1992; October 9, 1992; February 19, 1993; April 9, 1993; May 14, 1993; May 27, 1993; June 11, 1993; and June 29, 1993. As a result of the hearings held, the Court entered orders on the following dates:

(1) Memorandum opinion and order on Plaintiffs' motion to compel discovery dated June 24, 1992;

(2) Order dated July 21, 1992;

(3) Order dated August 7, 1992;

(4) Supplemental order dated September 25, 1992;

(5) Order granting Plaintiff's motion to adopt report of special master dated October 15, 1992;

(6) Order on pending motions dated October 23, 1992;

(7) Order dated November 16, 1992;

(8) Order dated December 10, 1992;

(9) Order imposing sanctions dated March 15, 1993;

(10) Supplemental order imposing sanctions dated April 14, 1993;

(11) Memorandum and order on hearings of May 14, 1993, and May 27, 1993, dated June 7, 1993; and

(12) Order on continuation of Plaintiffs' motion for sanctions hearing held June 11, 1993, dated June 15, 1993.

This Court had never experienced the kind of deliberate refusal to comply with discovery orders that was evidently taking place during this period of time. It became apparent to the Court that DuPont was using its in-house legal staff, local Wilmington, Delaware, counsel, national coordinating counsel, and others to carry out a deliberate effort to restrict legitimate discovery in these and similar cases. The Court entered an order making such a finding on March 15, 1993. Efforts by the Court to bring DuPont into compliance involved requiring an affidavit from, and subsequently the appearance of the

Defendant's Chairman of the Board and Chief Executive Officer, Edgar S. Woolard, Jr. Mr. Woolard assured this Court that DuPont understood what its discovery obligations were and that it would produce all documents responsive to the Plaintiff's requests. In spite of these assurances, the Defendant continued to refuse to honor the Plaintiff's legitimate requests and its earlier assurances to the Court that it would produce all responsive documents. Because of the repeated refusals of DuPont to comply with the orders of the Court, and in order to make an appropriate impression on DuPont, the Court was constrained to enter a conditional order imposing a monetary sanction of $500,000.00. As the case approached trial, the Court entered an order on June 7, 1993, addressing both the May 14, 1993, hearing and the May 27, 1993, hearing, and found, among other things, that:

> By way of preface, the Court notes that DuPont's prior non-compliance with the Court's discovery orders is exemplified by the fact that Mr. George Frank, DuPont's corporate counsel, submitted an affidavit on behalf of DuPont on January 4, 1993, wherein he certified to the Court that DuPont had fully complied with this Court's orders in that full production of documents had been made pursuant to the Plaintiffs' first requests for production even though he testified on cross-examination at the May 27 hearing that he never read through those requests. The Court finds such conduct to be typical of the Defendant's attitude toward discovery throughout the history of this case.

The monetary sanction against DuPont was increased in that order from $500,000.00 to $1,000,000.00 and was again reserved for later ruling by the Court following a future assessment of DuPont's discovery conduct.

A fifth sanctions hearing was held on June 11, 1993, at

which time the Court received evidence that DuPont had intentionally withheld documents related to the crucial issue in the case, cross-contamination of Benlate with sulfonylureas. At that fifth sanctions hearing, the Court received evidence that over one month prior to the hearing on May 6, 1993, DuPont scheduled the deposition of John Olsen, the contamination prevention coordinator at the Belle, West Virginia, DuPont plant. In connection with that deposition, the Court received evidence of the following:

(a) On May 5, 1993, the evening before his deposition, Mr. Olsen was in the Atlanta office of Alston & Bird with Elizabeth Gilley preparing for his deposition. He presented her with additional documents from the Belle, West Virginia, DuPont facility, which had not previously been produced to the *Bush Ranch* Plaintiffs, but which related to the cross-contamination of Benlate.

(b) Rather than produce the documents and go forward with the deposition, DuPont's counsel, on the eve of the Olsen deposition, falsely represented that Mr. Olsen was unavailable, and that the deposition would have to be canceled.

(c) Mr. Olsen's deposition was rescheduled for June 4, 1993, and it was not until the evening of June 3, 1993, that these same documents, already in the possession of DuPont counsel Gilley since May 5, 1993, were produced to the *Bush Ranch* Plaintiffs.

(d) In the interim between May 5, 1993, and June 3, 1993, representatives of DuPont, including Dr. David Johnson and Edgar S. Woolard represented to this Court that all responsive documents had been produced by May 14, 1993.

(e) DuPont recognized that documents concerning cross-contamination of Benlate with sulfonylureas generated after the *Bush Ranch* Plaintiffs' initial requests were responsive to and subject to production pursuant to Plaintiffs' request for supplementation (filed on May 24, 1993) to supplement the earlier document production.

As a result of the evidence presented at the June 11, 1993, hearing, the Court found as follows:

> Well, the Court finds that the Defendant, DuPont, continues to take every means possible to obstruct discovery to which the Plaintiffs are entitled. This is just a continuation of what has been going on for months.
>
> . . . Now, having stated as I did just a moment ago that the Court finds that the Defendant continues to take every means possible to obstruct discovery to which Plaintiffs were entitled, immediately the idea comes to mind, of course, well, just increase the monetary sanctions from a million to two million, or five million, or what not. But it's obvious that money does not make an impression on the Defendant.
>
> Now, with regard to what has been presented here today, the Court finds that it is without question now that the Plaintiffs have been clearly—*have clearly demonstrated that the Defendant has intentionally withheld documents relevant to the issue of cross-contamination of Benlate by Sulfonyl*, however you pronounce that, ureas. . . . *(I)t prejudices the Plaintiffs in the presentation of their case for these documents to have been withheld until 30 days before the beginning of the trial, when under the Court's order the documents should have been produced long ago.* In other words, the Plaintiffs' case is clearly prejudiced by this action, inaction on the part of the Defendant. It is simply an abuse of the discovery process. And during the recent weeks, since this is the worst case of this nature that I have ever had anything to do with, I have

> been interested in other cases that have dealt with abuse of the discovery process, and I haven't found a case that approaches this. In other words, I haven't found a case where the deliberate actions on the part of a defendant to obstruct the discovery process approach what has happened here. There may be some, but I haven't found any. (Emphasis added.)

Subsequent to that June 11, 1993, hearing, DuPont produced over 225,000 documents responsive to the *Bush Ranch* Plaintiffs' initial and supplemental requests, including many documents which were generated subsequent to Plaintiffs' initial document requests. ***None of the Alta test materials concerning SU contamination was included in that production.***

On June 26, 1993, Plaintiffs took the deposition of Nicholas Albergo, an expert witness named by DuPont. On that date, Mr. Albergo testified, among other things, that Alta had conducted tests of the *Bush Ranch* Plaintiffs' soils and waters for the presence of DuPont SUs. Based on the data, contained in the few charts available to him from Alta at that time, Mr. Albergo testified that there was *no evidence* of SUs in any of the *Bush Ranch* Plaintiffs' soils or waters which had been tested as reflected in the summaries.

A final sanctions hearing was held on June 29, 1993, less than one week before the trial of the *Bush Ranch* cases was to begin. At that time the Court received evidence concerning DuPont's continued non-compliance with its obligations and the Court's orders during the course of discovery, explicitly related to cross-contamination issues.

Present at the hearing as a corporate representative for DuPont was Dr. Joel Wommack, director of R & D and head of analytical chemistry for the Benlate Resolution Team since March, 1991. The Benlate Resolution Team was a group set up by DuPont to monitor, direct, and coordinate DuPont's legal efforts with regard to all Benlate litigation.

The Court's June 29 hearing was at a time when Alta's tests had already been conducted. None of the data or documents had been produced, nor had the attendant Alta documents, which disclose the history of the testing and the activities of DuPont in connection with the ultimate preparation of the Alta report and summaries, been produced. Those documents established that DuPont knew from at least early in the week before Mr. Albergo gave a discovery deposition on June 26, 1993, that there had been numerous initial positive findings of SU contamination, findings which the chemist conducting the tests has testified he recognized as "potentially bad news for DuPont" which he assumed might establish liability for damage at the *Bush Ranch* Plaintiffs' nurseries. These documents were withheld by Defendant from the Plaintiffs. While DuPont remained silent about the Alta data and documents, the Court made the following findings:

(a) ". . . but the Plaintiffs have been trying to get this information for a year. I've entered orders about producing tapes and producing results, and producing this, and producing another. And it's just been an ongoing battle for the Plaintiffs and their efforts, legitimate efforts, to obtain discovery material, to get this information. Finally, they get some of it, here just a week before the case is supposed to go to trial, and haven't got all of it yet."

(b) ". . . And by withholding this evidence until just a few days before the case goes to trial, of course, the effect is that once again the Plaintiffs have been prejudiced in the presentation of their case because they have been prevented because of the time constraints which are upon us, from conducting the discovery which would be necessary to further develop evidence concerning these deletions, and who did it, and why, and so on."

(c) "... the Court finds that the Defendant is not in compliance with the Court's order, and is *again ordered* to produce to the Plaintiffs before the close of business on Friday of this week, *all such information*, and particularly the Shalaby information, which has been the focus of two or three of our hearings." (Emphasis added.)

The record reveals that DuPont has taken several positions as to why no sanctions should be imposed in response to the show cause order. Among those positions, DuPont states that it was under no obligation to produce to Plaintiffs in the *Bush Ranch* cases the Alta data and documents. DuPont states that the *Bush Ranch* Plaintiffs' discovery, including the Plaintiffs' supplemental discovery served not long before trial, did not require the production of the Alta data and documents, and that if the discovery did so require, DuPont had no duty to supplement its discovery responses through trial. DuPont also states that there was no outstanding order of the Court requiring DuPont to produce *all* Benlate-related documents, which orders Petitioners allege would include the Alta data and documents.

Further, DuPont, at times, has argued that the Alta data and documents were not subject to production because of a claim of work product protection.

Concerning the chronology of discovery in the *Bush Ranch* cases, as it bears on the petition and the show cause hearing and as it bears on the reasons urged by DuPont why no sanctions should be entered, the Court summarizes its findings and/or finds as follows:

(a) The conduct and strategy of DuPont in the discovery process was controlled either through its in-house counsel, national coordinating counsel, or Wilmington, Delaware, counsel and not solely by Alston Bird or other local counsel, and DuPont continues to knowingly approve, ratify and acquiesce in the past and present conduct of its counsel in this and

subsequent Benlate cases. DuPont, through its corporate officers and other officials, ratified, approved, and adopted this conduct and strategy and caused the same to be used by counsel representing DuPont in Benlate cases all across the country.

(b) The Court found a continuing and deliberate effort by DuPont to impede, delay, and otherwise restrict legitimate discovery by Plaintiffs in the underlying cases and a repeated failure to comply with the Court's orders concerning discovery.

(c) Supplementation of discovery responses was both ordered by the Court and recognized by the parties; it is, moreover, encompassed within the civil rules.

(d) This Court maintained a continuing order outstanding through the trial of the *Bush Ranch* cases which required DuPont to produce all Benlate- related documents to Plaintiffs.

(e) Benlate-related documents included by definition all of the Alta data and documents.

(f) The Alta data and documents were not produced to Plaintiffs, were not offered to Plaintiffs, were not provided to this Court, or were not otherwise made available to this Court or Plaintiffs in the underlying *Bush Ranch* cases.

(g) DuPont made no claim of protection or privilege, either work product or attorney-client, to any of the Alta data and documents; and such a claim, if made, would not have been sustainable.

(h) DuPont engaged in a deliberate effort to obstruct discovery during the *Bush Ranch* cases.

(i) DuPont violated the rules of discovery, Court orders, and duty to participate in litigation in good faith during the *Bush Ranch* cases.

(j) Court orders entered during these cases clearly

required DuPont to produce all documents relevant to, or likely to lead to information relevant to, the contentions and defenses in those cases, including contamination of Benlate by SUs, the very subject of the Alta tests, and the hingepin of the *Bush Ranch* Plaintiffs' cases.

Whether or not Plaintiffs' soils were actually and in fact contaminated with SUs was recognized by both parties as the critical issue in the case. The Defendant, in fact, argued strongly to the Court that DuPont should be allowed to introduce the Alta lab test "summaries" on that subject and that the Court's failure to allow such evidence would be highly prejudicial to the Defendant on what DuPont characterized as "the critical issue in the case." That "critical issue" is, however, not an issue which the Court need resolve here as a predicate to deciding whether or not Defendant's conduct regarding the withholding of such evidence as claimed by the Petitioners here was conduct which should be sanctioned by the Court. Whether or not SUs were in fact present in the Plaintiffs' soils was for the jury in the *Bush Ranch* cases to determine. Whether or not there was *material evidence* bearing upon the presence of SUs in the Plaintiffs' soils which was improperly withheld by the Defendant is the question which this Court must determine. The Court must also determine at this time whether or not DuPont has even now told the truth about the circumstances surrounding the Alta data and documents. The evidence which actually went to the jury, with the exception of the Alta Labs evidence, as to the presence of SUs in the Plaintiffs' soils was highly contested. DuPont presented the Alta Labs test summaries through its witness Albergo, and that unrefuted showing that the sole test results on that subject showed *absolutely* no SUs present in the Plaintiffs' soils was the only direct evidence which the jury had as to the SU soil content resulting from analytical soil tests. All other evidence concerning the presence of SUs which the jury had before it, which evidence was circumstantial in nature, was contested by both sides, and the jury was left to weigh the

relative merits of opposing witnesses testifying as to differing views of whether or not, for instance, whether the boxes of Benlate supplied to the Plaintiffs contained SUs or whether or not it was possible for cross-contamination to occur at the fabricating plant in West Virginia where both Benomyl and sulfonylureas were produced.

Both sides had recognized Alta Labs to be highly regarded in the scientific community and most likely the only lab in the country capable of performing these very intricate, highly technical, and almost prohibitively expensive scientific tests. The introduction of the unrefuted critical opinion testimony by Mr. Albergo, stating without qualification that the Alta charts supplied to him by DuPont showed that no SUs were present in Plaintiffs' soils, effectively destroyed the Plaintiffs' circumstantial case on that decisive issue, just as testimony to the contrary would have been devastating to the Defendant's case had it been shown that its own experts at Alta Labs had reached an opposite finding that there *were* SUs present.

The evidence produced at this show cause hearing demonstrates clearly that DuPont's Alta Lab scientists had in fact found in June of 1993 substantial evidence as a result of their testing that samples from each of the Bush Ranch Plaintiffs' soils showed positive findings for SU contamination. Mr. Bethem, one of the two scientists from Alta Labs, testified at his deposition in late 1994, which was admitted as evidence at the May 1995 hearing, as follows:

Q: Does your data support a representation that there are no sulfonylureas in the Columbus, Georgia Plaintiff's soils, without a reference to the detection limit?

A: No. . . .

Q: And you could not state under oath or not under oath—

A: Okay

Q: —that sulfonylureas do not exist [sic] in the soil of the *Bush Ranch* Plaintiffs or the Columbus Plaintiffs at lower than fifty parts per trillion?

A: No, I could not state that with certainty.

Q: You have, in your data that reflect the presence of certain sulfonylureas in the extracts from certain samples at levels below that which you consider your detection limit, correct. . . .

A: *Yes, we do.*

Q: When Mr. Cella asked you a question, if you had any factual basis for the presence of SUs in the Columbus, Georgia soils, I believe you said you had no basis for determining--that you had no factual basis for determining, for stating that there were SUs in the Columbus case soils; is that correct?

A: With the detection limit of fifty parts per trillion

Q: *And, in fact, you do have a basis to believe that there were SUs in the extracts from those soils, don't you?*

A: *Yes, I do.*

(Emphasis added.)

Mr. Bethem also testified that, at the time he made his findings with Alta's regard to SUs in the Plaintiffs' soils, he considered those findings to be "bad news" for DuPont.

The Alta Labs personnel then promptly reported their findings to DuPont's lawyers, Alston and Bird, in mid June, 1993, and the Court concludes from the evidence that DuPont's Dr. David Johnson necessarily knew about these findings. The evidence was not communicated to the Plaintiffs despite DuPont's clear duty to do so and in fact was deliberately and consciously kept by the Defendant from becoming a part of the evidence in the case through the employment by the Defendant

of a scheme which the Court finds that DuPont perpetrated for the very purpose of hiding and concealing this critical and pivotal evidence.

The Court finds that DuPont's motive seems clear. Given the company's great reliance on and belief in scientific testing, together with the potential economic exposure because of the large numbers of pending but unresolved cases, a finding by its own scientists that its Benlate was contaminated with its own SUs would be particularly grave. The evidence is undisputed, however, that following its reporting of its initial findings of SUs in mid June 1993, Alta Labs was ordered by the Defendant to go back, "after most of the work is done" and to "confirm (defirm)" the positive findings. The Alta documents containing this disclosure were not produced by DuPont. Testing procedures were changed. The minimum detection limit was raised. Tests were repeatedly redone and massaged. Soil samples that had been found to be positive were "homogenized" with other parts of the soil sample. Although the written data which comprised the Alta test procedures was highly complex and technical and incomprehensible to people without very specialized analytical chemical training, those documents were carefully concealed from the Plaintiffs and were, in fact, not made available to the only expert, Mr. Albergo, who the Defendant selected to testify with regard to the conclusions to be derived from that data.

DuPont never offered, proffered or produced the Alta data and documents to the *Bush Ranch* Plaintiffs, despite a clear duty to do so arising from repeated orders of this Court, from the Civil Rules, and from its own commitments and representations. Those documents, in fact, only came to light after a ruling by the Hawaii Supreme Court forced DuPont months later to produce them. The documents establish that DuPont knew, from at least early in the week before Mr. Albergo gave his discovery deposition on June 26, 1993, that there had been numerous initial positive findings of SU contamination, findings which the chemist conducting the tests

has testified he recognized as "potentially bad news for DuPont," and which he assumed might establish liability for damage at the *Bush Ranch* Plaintiffs' nurseries.

Rather than having the chemist who performed the tests testify as to the results of those tests, the Defendant chose instead to falsely present the results and conclusions of those tests through a witness untrained in analytical chemistry and incapable of interpreting the data showing the positive findings that Alta had made. Documents characterized by the Defendant as "Summaries" were supplied to Mr. Albergo, which documents purported to list in a table tests that Alta Labs had run on each of the *Bush Ranch* Plaintiffs' soil. Only a portion of these summaries were supplied to Plaintiffs a few days before the trial began and the remainder were withheld until after Plaintiffs had rested their cases and Defendant was well into its case. These "Summaries" were represented to be the results of the work of Bethem and Petersen of Alta Labs compiled in table form, and showing for each soil sample that no SUs were detected at the detection limit shown on the chart.

When the Defendant attempted to introduce the documents at trial through their witness Albergo who they had called as a remediation expert. Plaintiffs objected to the introduction of the charts on the basis that the witness had not performed the work on the soil testing and was not competent to authenticate and vouch for the document.

The Court did not allow the introduction of the charts but did allow the witness to give his opinion as an expert based upon the hearsay conclusions evidenced in the tables. The Court now finds that Mr. Albergo on voir dire falsely represented to the Court his role in the oversight and supervision of the Alta tests which led to the preparation of those so-called summaries. During that voir dire and argument by counsel as to whether or not the Court should admit the tables or the information which the tables purported to show, the Court finds counsel for DuPont misrepresented to the Court and misled the Court and Plaintiff's counsel as to the true facts

surrounding what the Alta Labs tests showed with regard to the presence of SUs in the soil samples tested by Alta. The Court further finds that the evidence which the Court permitted to go to the jury, based upon the false and misleading testimony of Albergo and upon the false and misleading representations and arguments of DuPont's counsel, provided the false basis for the Defendant to argue throughout the remainder of the case, without contradiction, that the test evidence showed that no SUs were present in the soils of the Plaintiffs. The Court further finds that the evidence is now clear that, had the Plaintiffs been given the information which the Alta tests disclosed and had not been led to believe that those tests showed no presence of SUs, the trial of the case may have been materially altered. The presentation of Plaintiff's witnesses, the cross examination of Defendant's witnesses, Plaintiff's rebuttal case, opening statements, and closing arguments, at the very least would have been entirely different.

Specifically, the Court finds:

That DuPont's expert, Nicholas Albergo, testified falsely and misled the Court as to his role in the supervising, directing, and controlling of the Alta Lab scientists, and in his understanding of the basis for the summaries in connection with the testing of the Plaintiffs' soils in the *Bush Ranch* tests. In order to bolster his own credibility, Mr. Albergo testified to the *Bush Ranch* jury that, "I visited the labs that I used, personally discussed the results with the analytical chemists, and personally looked at the raw data." These statements were false. In reality, it is clear that Mr. Albergo and others have now testified that Mr. Albergo had little, if any, contact with the Alta analytical chemists, did not see or review any of their raw data, nor did he consult with them about the methodology or results. Mr. Albergo testified by deposition January 19, 1995, that he was not actually involved in these tests; that he had not hired Alta; that he had not discussed the results or methodology with the Alta chemists or DuPont's counsel, that he had not reviewed any raw data; that he was never provided

any data by DuPont, Alta, or DuPont lawyers; that he only saw summaries of the test results; and that, in fact, he had never even asked about the results or the underlying data.

That DuPont's counsel, Elizabeth Gilley, misrepresented to the Court during argument on the voir dire of the witness, Mr. Albergo, what the role of that witness was in procuring, supervising, directing, and controlling the Alta Labs scientists in the conduct of the testing of the Plaintiffs' soils in the *Bush Ranch* tests.

That Ms. Gilley, in conjunction with DuPont's expert Nicholas Albergo, represented to this Court that Mr. Albergo worked closely with the analytical chemists at Alta running these tests and consulted with them concerning the methodology of the tests, the results of the tests, and data underlying the tests. Ms. Gilley then stated:

> No, Your Honor, but they were conducted under his direction. He selected the labs to perform the analysis, he directed them as to what analysis should be performed, he told them what to look for, told them what methods to use, and they did everything under his direction and control. . . . So, Your Honor, we would submit that he would be entitled to testify to the results, to submit the data in support of those results because he is entitled to rely on that information as an expert in that field. All this information is documentary evidence that he testified about in his deposition.

That DuPont's counsel, Dow N. Kirkpatrick, Jr. misrepresented to the Court during argument on the voir dire of the witness, Mr. Albergo, what the role of that witness was in procuring, supervising, directing, and controlling the Alta Lab scientists in the conduct of the testing of the Plaintiffs' soils in the *Bush Ranch* tests.

That in arguing to allow Albergo to testify and to permit the introduction of the Alta summaries into evidence, Mr. Kirkpatrick said:

> This is the only expert in the entire case who has actually taken these samples and had them analyzed, and this is *the issue* because Plaintiffs have claimed that they have contamination on their property although they have no proof. *And we have now got someone that has analyzed all of the samples, and will come in here and tell this Court and this jury that there are no SUs [sulfonylureas] on the property, in the plants, or in the product. And we believe that that testimony is critical.* (Emphasis added.)

and

> The point simply is that we have the evidence that there are no SUs out there. That is the issue in the case. . . .

and

> Your Honor, we're talking about the crucial issue in the case. . . .

That DuPont's counsel, Dow N. Kirkpatrick, Jr. misrepresented to the Court during closing argument to the jury what the witness, Albergo, actually did and what the findings of the Alta Labs scientists actually were.

That in argument to the jury in closing Mr. Kirkpatrick said:

> . . . Nick Albergo went out and tested soil and other samples. *He didn't find any SUs in the soil or any of the samples out there.* Those are our tests. Where are their tests? Do you recall when everybody went out, they dig up a shovel of dirt. We'd get half of it, they'd get half of it.

> *We brought our test results in here.* Where are their test results. Dr. Jones found plant disease. Mr. Albergo found no SUs.
>
> . . . And our tests, *the ones Mr. Albergo did,* show there are not any SUs out there. What about Bush Ranch who plants his plants in the ground? He can't claim sulfonylureas damage either. We tested for that. Mr. Albergo gave you the results in that test.
>
> . . . All of this factual scientific information is in contrast to the Plaintiffs in these cases who are talking about some minute, very small sulfonylureas contamination in Benlate which they think has wiped out their plants. The evidence shows that sulfonylureas are not present in Plaintiffs' Benlate soil. . . . On the other hand, what did DuPont do? We asked Nick Albergo, a remediation specialist from Tampa to make a complete assessment. He visited each site, studied the property, took numerous samples, soil, water, air, other materials. He had them analyzed. You heard the results. There is no contamination. There are no SUs in the soil, water, or anywhere. (Emphasis added.)

That DuPont presented testimony, evidence, and argument that there was no evidence of SUs in the Plaintiffs' soils and water, knowing the same to be false and misleading to the Court and jury.

That in relying on a summary of the Alta data and documents, DuPont's expert Albergo inherently relied on the data and documents generated by Alta Labs.

That DuPont's conduct with respect to this self-described "most critical" evidence was in violation of the Court's orders, the Federal Rules of Civil Procedure, a

litigant's duty of good faith and DuPont's express agreements and representations, and, in and of itself, and in connection with the other conduct which occurred in the *Bush Ranch* cases deprived those Plaintiffs of a fair trial and constituted a willful, deliberate fraud on this Court.

That DuPont precluded, through its willful misconduct, meaningful cross- examination of witnesses, meaningful scientific debate within the courtroom and meaningful argument to the jury on this self-described "most critical issue in the case."

That DuPont improperly valued its own views of "science" to the exclusion of having the "science" tested in the crucible of the courtroom.

That DuPont has now acknowledged that, as to the Alta data and documents, scientists can and do disagree concerning the ultimate conclusion and effect of Alta's tests. In fact, DuPont acknowledged that the Alta data and documents were subject to scientific opinion that SUs *were* in the *Bush Ranch* Plaintiffs' soils and water.

That Todd David, one of Defendant's lawyers, testified:

Q. [Mr. Gill]	Okay, and similarly there is a disagreement as to what the *Bush Ranch* initial findings mean or don't mean, right? There could be a scientific dispute about that.
A. [Mr. David]	Well, I know that Mr. Bethem stands by his report from Alta as to the *Bush Ranch* samples.
Q.	Can you answer the question?
A.	I know that Dr. Jodie Johnson disagrees with Mr. Bethem's conclusion.
Q.	Right. So, if you have the raw

data, there could be a scientific disagreement about what all that means, right?

A. Yes, and had Mr. Pope's folks—

Q. You explicitly said to Judge Roberts, speaking about *Bush Ranch* that there is a scientific disagreement about what all that means, right?

A. Absolutely, sir.

While the *Bush Ranch* jury was deliberating the parties reached agreement on a settlement. The parties approached the Court and DuPont presented to this Court a motion to vacate the sanctions orders. DuPont represented there that, "Plaintiffs have agreed that, during the course of the case, DuPont did come in compliance with the Court's orders and its discovery obligation." While Plaintiffs could not and did not know that this representation was false, DuPont did. In reliance upon those representations, this Court vacated the discovery and sanctions orders. DuPont obtained that order through a deliberate and willful fraud on the Court, concealing and continuing its prior pattern of abuse. In so doing, DuPont has made this Court an instrument of its continuing fraud.

Within a month after the conclusion of the *Bush Ranch* cases, DuPont went to trial in another Benlate case, this time in Florida (*Lambert v. DuPont*). *See Lambert, et al. v. E.I. DuPont, et al.*, Civil Action No. CA-92-067, In the Circuit Court, In and For Hardee County, Florida. A third such trial occurred approximately four months after the end of the *Bush Ranch* cases, again in Florida (*Ritter-Whitworth v. DuPont*). *See Whitworth, et al. v. Harrell's, Inc., et al.*, Civil Action GC-G-92-1293 and *Ritter, et al. v. Growers Fertilizer Corp., et al.*, Civil Action No. GC-G-1374, In the Circuit Court of the Tenth Judicial Circuit In and For Polk County, Florida. In each

of those cases, an identical pattern emerged. Alta was called on to conduct tests for the presence of SUs through the same analytical method used in *Bush Ranch*, and, in each instance, obtained positive results. In *Lambert*, the Alta chemist has (after completion of the trial) testified that he found the positive SU results to be conclusive. In both instances, DuPont intentionally withheld from the plaintiffs those test data and, as in *Bush Ranch*, was able to argue to the Court and the jury that the evidence established that there were *no* SUs in the Plaintiffs' soils or waters. *See* re *Lambert*, the following: May 3, 1995, Hearing Transcript, at pp. 465-467; May 9, 1995, Hearing Transcript, pp. 760- 765; May 8, 1995, Hearing Transcript, at pp. 656-670, 694; May 9, 1995, Hearing Transcript, at pp. 761-784; May 11, 1995, Hearing Transcript, at pp. 1460-1461; Dr. Richard Browner, December 2, 1994, *Kawamata Farms*, Trial Transcript (PX 10); Dr. J. Johnson, August 22, 1994, *Hashimoto* Trial Transcript at pp. 36-37 (PX 11). *See also*, PX 80 and 81. *See*, re *Ritter-Whitworth*, the following: May 8, 1995, Hearing Transcript at pp. 579-583, 606- 620, 642-648. *See also*, PX 97 and 98.

Following a bitter discovery dispute in another Benlate trial, *Kawamata Farms v. DuPont*, Civil Action No. 91-437 (Kona) and 920247K (Kona) In the Circuit Court of the Third Circuit, State of Hawaii. The Hawaii Court ordered DuPont to produce data and documents from Alta, which included the *Bush Ranch* data and documents, draft reports, and telephone memoranda. For the first time, the test data containing those parts indicating positive findings were disclosed, along with notes from Alta showing Defendant's directive to "confirm (defirm)" the positive results. DuPont strenuously resisted production both in the trial court and through mandamus in the Supreme Court of Hawaii, and asserted a claim of privilege as to the Alta data and documents, which claim is directly opposite to DuPont's assertions to this Court in the show cause hearing. As set out, *infra*, this Court has concluded that DuPont has presented false positions here when contrasted with its judicial admissions and assertions elsewhere.

For example, DuPont has maintained here:

(1) that it was not required by court order, rule or discovery request to produce the Alta data and documents;

(2) that the Alta data and documents were shielded by a work product privilege despite DuPont's representations to the Court that the Alta people were fact witnesses, and despite having never claimed a privilege or logged such documents in the required privilege logs;

(3) that the *Bush Ranch* Plaintiffs never requested the Alta data and documents;

(4) that DuPont "absolutely" did offer the data and documents to Plaintiffs' counsel in the *Bush Ranch* proceedings, but that Plaintiffs' counsel declined them;

(5) that DuPont *would have* produced the Alta data and documents if the *Bush Ranch* Plaintiffs had made a Rule 1006 "objection" to the misleading "summaries;"

(6) that some part of the Alta data and documents were "available" in the courtroom after the *Bush Ranch* Plaintiffs rested, but that not all of those papers were present, and DuPont cannot say what parts were and what were not present, although it is now clear that a number of the most damaging parts were *not* present, assuming any of them were, since DuPont never advised the Court or opposing counsel of the claimed availability of a box of such papers in the courtroom. In Hawaii, however, DuPont argued that the *Bush Ranch* Alta data and documents were subject to a privilege which had *never* been waived, and that those papers had *never* been offered, proffered, tendered, or

used in the *Bush Ranch* or any other Benlate trial.

The Circuit Court in Hawaii, like this Court, found DuPont's discovery abuses to be unprecedented, and imposed a sanction of $1,500,000.00. This Court is not engaged in determining whether a sanction should be imposed for DuPont's conduct in other courts, but its clear pattern of concealment and misrepresentation concerning the same issues bears on DuPont's intent, willfulness, and motive, and relates to the credibility to be given to its current professions of a corporate intent or desire to conform to the discovery rules and court orders.

The Hawaiian production led plaintiffs in other Benlate cases to take the depositions of the Alta witnesses, Mr. Albergo and others, thereby disclosing much of the history of the events surrounding the Alta tests. This Court is not persuaded that DuPont has even now told the full truth of its conduct in that regard.

In the proceedings before this Court on the show cause order, the Court finds that DuPont, when confronted with the allegations of the petition, which were supported by transcripts from other court proceedings, depositions, and court orders, has not fully and truthfully responded to those charges. Instead, it has engaged in evasion, equivocation, and falsehood; through its witnesses such as Mr. David and Mrs. Gilley, DuPont refused to give straightforward answers to questions about its conduct in regard to the Alta documents and its positions before other courts, refused to give words their plain and ordinary meanings, and refused to respond candidly or directly; it has sought to give a distorted reading to the plain meaning of words; it has created a whole series of after-the-fact excuses which are not supported by the facts and events; it has put forward legally and factually inconsistent efforts at justifying its conduct; it has contradicted its own solemn representations to other courts, made to induce those courts to rule favorably to DuPont; it has resisted producing witnesses before this Court

who have knowledge of the facts, and those witnesses who did testify for DuPont were not credible; it has sought to avoid answering for its conduct by making irrelevant *ad hominem* attacks on Petitioners, Petitioners' counsel, and the Court; it has filed affidavits based on incomplete or inaccurate recitals of the predicate facts; it has distorted the rules of evidence and the Civil Rules; it is clear that DuPont continues to evidence an attitude of contempt for the Court's orders and processes, and to view itself as not subject to the rules and orders affecting all other litigants.

DuPont's actions and representations concerning the Alta data and documents, and its ultimate false representation concerning compliance with the order of this Court, constituted a fraud on the Court and a contempt of the Court's orders. DuPont's conduct of concealment and misrepresentation has continued through the show cause hearing. This conduct merits, indeed requires, vigorous action by the Court and the imposition of severe sanctions.

The Court's Authority

DuPont has questioned the authority of this Court to issue the show cause order and conduct the hearing which ensued, contending also that the Court does not have the power to impose sanctions.

This Court has the power, the authority, and the jurisdiction to investigate allegations of a fraud on the Court and a fraud on the judicial system, particularly where the alleged fraud was accomplished by concealing highly relevant and discoverable information and evidence, bearing on the most critical issue in the case, from the opposing parties and their counsel, from a testifying expert witness, and from the Court and the jury; where the production of such information and evidence was, pursuant to court orders, subject to both initial and supplemental discovery requests, was required by the Court's orders, and had been promised by DuPont's Chief Executive Officer, DuPont's legal department, and DuPont's trial counsel; where the alleged fraud ultimately involved the

knowing and willful presentation to the Court and/or to the jury of false testimony and false argument; and where the alleged fraud involved the presentation to the Court of a motion containing materially untrue statements for the purpose of, and with the result of, obtaining an order from this Court vacating prior findings of discovery misconduct, and relieving DuPont of an obligation to pay monetary sanctions. Such final action of presenting a false representation to the Court to obtain relief had the effect of using the Court as an instrument to further the misconduct and fraud of DuPont.

The *Bush Ranch* Plaintiffs and DuPont agreed in the pretrial order in those cases (see PX 1) that this Court had jurisdiction over the parties and the subject matter there involved. The alleged fraud occurred in this Court, and this Court is the proper, if not the only, forum in which the matters raised in the present petition can, in the first instance, be determined. *See Ex Parte Bradley*, 7 Wall. 364, 372, 74 U.S. 364, 372, 19 L. Ed. 214, 217 (1868) (it is anomalous for one court to take cognizance of an alleged contempt committed before and against another court; the court wherein the contempt occurred possesses ample powers to take care of its own dignity and punish the offender). *See also Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991) (power to punish for contempts inherent in all courts). This Court has the power, the authority, and the jurisdiction to sanction DuPont, to hold DuPont in civil contempt, and otherwise to act to enforce the authority of this Court, if the allegations are shown by clear and convincing evidence to be true. This Court relies on its inherent powers, 28 U.S.C. § 1651 and 18 U.S.C. § 401, Federal Rules of Civil Procedure 11, 26, 33, 34, and 37, and case authority, including *Chambers v. NASCO, Inc., supra; Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944); *Shillitani v. United States*, 384 U.S. 364 (1966); *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946);

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990), *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. ____, 114 S.Ct. 1673, 128 L. Ed.2d 391 (1994); *Ex Parte Wall*, 17 Otto 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883); *Ex Parte Robinson*, 19 Wall, 505, 86 U.S. 505, 22 L. Ed. 205 (1873); *Ex Parte Bradley*, 7 Wall 364, 74 U.S. 364, 19 L. Ed. 214 (1868); *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536 (11th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 181, 126 L.Ed.2d 140 (1993); *BankAtlantic v. Blythe Eastman Paine Webber*, 12 F.3d 1045 (11th Cir.1994); *Harre v. A.H. Robins Co.*, 750 F.2d 1501 (11th Cir.1985), opinion vacated in part on reconsideration, 866 F.2d 1303 (11th Cir.1989); *Sizzler Fam. Steak Houses v. Western Sizzlin Steak*, 793 F.2d 1529 (11th Cir.1986); *Carlucci v. Piper Aircraft Corp., Inc.*, 775 F.2d 1440 (11th Cir.1985); *Brandt v. Vulcan, Inc.*, 30 F.3d 752, 757 n. 7 (7th Cir.1994); *Properties International Ltd. v. Turner*, 706 F.2d 308 (11th Cir.1983); *Southerland v. Irons*, 628 F.2d 978 (6th Cir.1980); *Town of Columbus v. Barringer*, 85 F.2d 908 (4th Cir.1936); *Porcelli v. Joseph Schlitz Brewing Co.*, 78 F.R.D. 499 (E.D.Wis.1978); and *United States v. Pendergast*, 35 F.Supp. 593 (W.D.Mo.1940).

"The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice." *Ex Parte Robinson, supra* at 510. By statute, summary punishment for contempts may be inflicted: "1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2nd, where there has been misbehavior of any officer of the courts in his official transactions; and, 3rd, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts." *Id.* at 511.

"The power to punish, as contempt, misbehavior committed in the presence of the court is an inherent power. Congress has not limited the time within which it may be punished. Perhaps there is an inherent limitation in the inherent power, a limitation arising out of laches—the punishment must not be unreasonably delayed. Certainly it is not unreasonably delayed if a proceeding for punishment is begun as soon as the misbehavior is discovered, particularly if the misbehavants, by concealment and fraud, have prevented the discovery." *United States v. Pendergast,* 35 F.Supp. 593, 599 (W.D.Mo.1940). The *Pendergast* Court explained apparently limiting language in *Ex Parte Robinson, supra,* which is not quoted above.

> If any doubt at all could arise from the language of the Supreme Court in *Ex Parte Robinson, supra*, it certainly was entirely dissipated in the later opinion in *Toledo Newspaper Co. v. United States,* 247 U.S. 402, 38 S. Ct. 560, 62 L. Ed. 1186. It was made perfectly clear by the opinion in that case that contempt was not restricted to interference with 'order and decorum.' When the opinion is read in connection with the opinion of the district court in the same case (220 F. 458) it is clear that it is the effect on the administration of justice which is the test of whether' misbehavior is contempt. If the tendency of the misbehavior is to affect the administration of justice, it is contempt, whether it is in the presence of the court or at some point away from the presence of the court, whether it affects the order and decorum of the courtroom or does not affect them.

Pendergast, 35 F. Supp. at 596.

Civil contempt has a remedial purpose, not the least of which is to give force and vitality to judicial decrees. "The

private or public rights that the decree sought to protect are an important measure of the remedy." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1948). *See also, Universal Cooperatives, Inc. v. Tribal Co-Operative Marketing Development Federation of India, Ltd.*, 45 F.3d 1194, 1196 (8th Cir.1995) ("Sanctions are on occasion necessary 'not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.' *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L. Ed.2d 747, 751, (1976)").

"There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States,* 384 U.S. 364, 370 (1966). Here, DuPont violated not just one court order, but an entire series of court orders, and misrepresented its conduct to the Court. DuPont breached its discovery obligations, its duty to proceed in good faith, and its representations to the Court and counsel. DuPont elicited and presented false testimony from a key witness. DuPont argued falsely to the Court and the jury. DuPont discredited the *Bush Ranch* Plaintiffs' witnesses with the Alta tests. DuPont's contemptuous fraud on this Court was brought to the attention of this Court as soon as practicable after the discovery of the conduct. DuPont's conduct constitutes contempt of this Court.

The Court of Appeals of this circuit recently considered and addressed a situation where, like here, the defendant "stubbornly withheld discoverable information. . . ." *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1563, 1565 (11th Cir.1993). There, the district court specifically found four methods whereby the Defendants had resisted discovery: first, the defendants played word games, saying that certain words and phrases were not defined; second, the defendants unilaterally limited the meaning or scope of discovery requests; third, the defendants failed to produce documents ordered to be

produced and in so failing showed disdain for the Court's orders; and fourth, the defendants deliberately covered up damaging evidence. *See id.* at 1566-67. A review of the evidence here reveals all of the discovery avoidance methods shown in *Malautea*. Even more egregious misconduct occurred here than occurred in *Malautea*.

In *Malautea* the district court chose to strike the defendants' answers and enter a default judgment against them on the issue of liability. The Court of Appeals affirmed, despite the defendants' contentions that the suppressed evidence referenced by the Court was not encompassed by the Court's discovery orders, that the discovery orders were vague, and that any failure to comply was simply a misunderstanding. *See id.* at 1569. The Court of Appeals held that the Federal Rules (there Rule 37(b)(2)(C)) "give district judges broad discretion to fashion appropriate sanctions for violation of discovery orders. . . ." *Malautea*, 987 F.2d at 1569. This Court also recognizes, in accord with the Court of Appeals' directions, that any sanction must be just, that is, it must comport with the requirements of due process, and that certain sanctions may only be imposed where the district court finds a willful or bad faith failure to obey discovery orders. *Id.*

In this matter, DuPont, like Suzuki in *Malautea*, has argued that the Alta data and documents were not encompassed by the Court's orders, that the orders were vague, or that DuPont simply misunderstood the orders. As reflected by this Court's preceding findings, those arguments are not supported by any credible evidence. To the contrary, the clear and convincing evidence directly contradicts DuPont's positions in this regard.

Observations About Discovery

The obvious and overall purpose of discovery under the Federal Rules is to require the disclosure of all relevant information, so that the ultimate resolution of disputed issues in any civil action may be based on a full and accurate understanding of the true facts, and therefore embody a fair and

just result. *United States v. The Procter & Gamble Company,* 356 U.S. 677, 682; *Hickman v. Taylor,* 329 U.S. 495, 500-01 (1947). It is intended to operate with minimal judicial supervision unless a dispute arises and one of the parties files a motion invoking judicial intervention. The rules require that discovery be accomplished voluntarily; that is, the parties should affirmatively disclose relevant information without the necessity of court orders compelling disclosure. This is because lawyers are expected to act in good faith, follow the rules and do their duty as officers of the court *seeking the truth. Malautea, supra; Pesaplastic, C.A. v. Cincinnati Milacron Co.,* 799 F.2d 1510, 1521-23 (11th Cir.1986).

In cases involving claims of injury to person or property caused by defective products the subject matter is complex. Discovery is necessarily complex as well.

Adversarial machinations surrounding the discovery process are often at odds with the stated purpose of the Federal Rules of securing the just, speedy and inexpensive determination of every action. But procedural manipulation designed to frustrate resolution of disputes on their merits has become a common strategy.

It is the obligation of counsel under the rules, as officers of the court, to cooperate with one another so that in the pursuit of truth the judicial system operates as intended; so that neither the Court nor the litigants are put to unnecessary trouble and expense in pursuit of the truth; and disputes are resolved on their merits as promptly and economically as the circumstances of the case permit. A litigant should not be allowed to play games with the court by concealing, denying, or giving an evasive answer to what he knows to be true. *Malautea, supra; Pesaplastic, C.A. v. Cincinnati Milacron Co., supra.*

The rules are binding on the *parties* as well, and they must comply with their obligations. *Malautea, supra.* Attorneys have a continuing duty to advise their clients of their duty to make honest, complete, non-evasive discovery

disclosures, as well as the spectrum of sanctions they face for violating that duty. Fed.R.Civ.P. 26(g).

The Federal Rules require that counsel make a reasonable investigation and effort to assure that the client has provided all information and documents available to it which are responsive to the discovery request. It is also required that counsel certify that the responses to discovery requests are complete and correct, and that objections are well grounded in fact and law and not interposed for delay or other improper purpose. Fed.R.Civ.P. 26(g); Federal Rules Advisory Committee Notes, 1983 Amendments, Fed.R.Civ.P. 26(g).

The courts do not have the time to micro-manage discovery in every case. They must depend on their officers, the lawyers, to keep faith with their primary duty to the court as its officers, and so make the discovery system work by voluntarily making the required disclosures. Counsel should not be allowed to "sell out" to their clients. *Malautea, supra; Pesaplastic, C.A. v. Cincinnati Milacron Co., supra.*

Sometimes the source of the problem is the litigants themselves, as is its cure. In some types of litigation the motivation to resist discovery is so great that offenders will not comply with discovery unless they know in advance that the cost of "stonewalling" will be greater than the benefits. Only by imposing harsh sanctions against a willfully deceitful and evasive litigant do the courts take the advantage out of such misbehavior and turn it into a decided disadvantage. Only by doing so can the courts empower their officers to refuse involvement in such misconduct, and give them the power to persuade their clients that such is not in their best interests. There will be no point in paying lavish litigation fees and costs to a lawyer to suppress the truth if the swift and certain punishment will follow. The choice can and should be made simple and clear: Litigate in our courts honestly and by the rules, or suffer the consequences. The public expects and deserves no less if confidence in our judicial system is to be preserved, as it must be. *Hogue v. Fruehauf Corp.*, 151 F.R.D.

635 (C.D. Ill.1993); *Baker v. General Motors Corp.*, CA 91-0991-CV-W-8 (W.D. Mo.1994).

The Court's Orders and the Federal Rules

This Court, in a series of orders dating from June 24, 1992, required, and the parties understood, that DuPont was obligated to produce *all* Benlate related documents to the *Bush Ranch* Plaintiffs. Those orders extended through and included the trial of the *Bush Ranch* cases. Those orders required the production of the Alta data and documents, and DuPont's failure to produce such data and documents constitutes a conscious, willful, and deliberate violation of this Court's orders. *See* PX 29-40.

Furthermore, under the circumstances presented here, DuPont had a duty *under the Federal Rules* to reveal the contents of and to produce all of the Alta data and documents stemming from the tests conducted on the *Bush Ranch* Plaintiffs' soils and waters. As in force during the pertinent period, Fed.R.Civ.P. 26(3) provided that:

> (e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (a) the identity and location of persons having knowledge of discoverable matters, and (b) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.
>
> (2) A party is under a duty seasonably to amend a prior response if he

> obtains information upon the basis of which (a) he knows that the response was incorrect when made, or (b) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
>
> (3) A duty to supplement responses may be imposed by order of the Court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

See Anderson v. Cryovac, Inc., 862 F.2d 910, 927 n. 12 (1st Cir.1988). *See also McNally v. Yellow Cab Co.*, 16 F.R.D. 460 (E.D. Pa.1954) (notwithstanding any attempt to make the duty to supplement continuing, "it may not be out of place for the Court to say at this time what should be obvious, namely, that the Defendant is bound to give truthful answers to the interrogatories and that both good faith and the spirit of the Rule require it to see to it that its answers are truthful as of the time of the trial as well as the time when the interrogatories are answered").

Pursuant to Rules 26(e)(1) (2), because the substance of the witness Albergo's testimony was misrepresented at his deposition, and because the response that the Alta data and documents showed no evidence of SUs in the *Bush Ranch* Plaintiffs' soils and waters was incorrect when made and/or became no longer true such that DuPont's failure to amend that response constituted a knowing concealment, under Rule 26(e)(3), because "[a] duty to supplement responses [*had*] been imposed by [orders] of [this Court], agreement of the parties, [and] . . . through new requests for supplementation of prior responses [,]" DuPont had a duty to supplement its discovery responses, including those responses concerning the data obtained from tests conducted on Plaintiffs' soils and waters. *See Anderson, supra.* DuPont violated both the letter

and the spirit of the Federal Rule, and the duty to perform its discovery obligations in good faith, by failing to supplement its discovery responses and by failing to respond completely and accurately to discovery requests. *See McNally, supra.*

Courts broadly interpret what constitutes an "order" for the purpose of imposing sanctions. *See Brandt v. Vulcan, Inc.*, 30 F.3d 752, 756 n. 7 (7th Cir.1994), *citing Metropolitan Life Ins. Co. v. Cammon,* No. 88 C 5549, 1989 WL 153558, at 4 (N.D. Ill. November 7, 1989) (violation of an "order" found where a party failed to deliver documents it promised to turn over by a certain date), and *Properties Int'l., Ltd. v. Turner,* 706 F.2d 308, 310 (11th Cir.1983) (order found where a court directed a party to provide its opponent "with complete discovery"). Notwithstanding the valid order of this Court in place at the time DuPont's malfeasance occurred, and DuPont's obligation to supplement its discovery responses with this clearly discoverable information and relevant evidence, this Court concludes that the correspondence between DuPont and the *Bush Ranch* Plaintiffs, and the representations made during Albergo's deposition, both constitute agreements binding DuPont and requiring it to produce the Alta data and documents. These agreements are clear to the Court, despite DuPont's contentions here that the correspondence reflected some other intent and despite the evasiveness of DuPont's counsel at Albergo's deposition. A fair reading of both the correspondence and the deposition shows the *Bush Ranch* Plaintiffs' requested all data and documents generated by the Alta tests, including "hard copy" and "analytical data." Those agreements made by and with officers of the Court, considering the discovery background in the *Bush Ranch* cases, constitute, for the purposes of this matter, "orders" of this Court. *C.F. Wehner v. Syntex Corporation,* 107 F.R.D. 248 (E.D. Mo.1985) (as a condition for the taking of samples, which in *Wehner* were in the possession of the EPA, one can condition such taking on an agreement to make the results available to the person or party from whom the samples were taken). DuPont represented as early as August 26, 1992, that DuPont would

produce "everything related to Benlate." DuPont acknowledged during the hearing that, at the time the May and June of 1993 correspondence occurred, and at the time of Albergo's deposition, outstanding Court orders required the production of all Benlate-related documents. These representations and acknowledgements clearly indicate that DuPont knew of its duty and makes its subsequent failure to produce the Alta data and documents a violation of Court orders.

All prior orders of this Court were supported by the facts and the law and were valid Court orders. " 'Discovery orders must be obeyed even by those foreseeing ultimate success in the district court.'" *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1571 (11th Cir.1993), quoting *United States v. $239,600 in U.S. Currency*, 764 F.2d 771, 773 (11th Cir.1985). DuPont disagreed with this Court's discovery and sanctions orders in the *Bush Ranch* litigation, though during the hearing on the present petition, DuPont's CEO acknowledged that the Court was justified in its earlier orders. In any event, whether DuPont agrees or disagrees with the Court's orders, DuPont was compelled to obey those orders absent relief from the appellate court, which it sought to no avail.

The "Summaries" and Rule 1006

The "summaries" which DuPont sought to have admitted as evidence were not summaries of all of the findings produced by the Alta tests, but were selected charts and tables showing only parts of the findings which DuPont believed to be adequate to lead an expert witness to testify that there was no evidence of Benlate contamination of the *Bush Ranch* Plaintiffs' property. As already noted, the Court did not allow the summaries to be admitted in evidence but did allow the witness Albergo to use them as hearsay as a basis for his opinion.

Federal Rule of Evidence 1006 provides as follows:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both by other parties at [a] reasonable time and place. The court may order that they be produced in court.

The plain language of this rule makes it clear that Rule 1006, if used according to its terms, may be a vehicle to introduce charts, summaries, or calculations into evidence. Common sense reveals, and the case law indicates, that the proponent of such summary must invoke and rely upon the rule. *See United States v. Atchley,* 699 F.2d 1055, 1059 (11th Cir.1983) (chart introduced *pursuant* to Rule 1006); *United States v. Harmas,* 974 F.2d 1262 (11th Cir.1992) (introduction of summary evidence not error because *proponent laid the proper predicate* and the information summarized was before the jury in the form of documentary evidence). *See also United States v. Meyers,* 847 F.2d 1408, 1412 (9th Cir.1988) (*proponent of summary* of voluminous writings must establish that the underlying materials upon which the summaries are based are admissible into evidence, though such voluminous writings need not always themselves be admitted); *United States v. Bakker,* 925 F.2d 728, 736-37 (4th Cir.1991) (original voluminous material need not be introduced into evidence, but it must be made available to the other party); *Nichols v. The Upjohn Co.,* 610 F.2d 293 (5th Cir.1980) (documents from which summaries created had been provided to Plaintiff prior to trial for examination).

The summaries which DuPont sought to introduce into evidence through Mr. Albergo were hearsay. Albergo did not prepare them, and he could not authenticate them, other than to say he received them. Nor could Albergo vouch for the truthfulness, accuracy, or completeness of the summaries.

Further, Albergo could not authenticate or otherwise testify at all about the underlying Alta data and documents, in that he did not receive them, did not prepare them, did not review them and, according to his qualifications and testimony, could not understand them. In short, Albergo was a mouthpiece through which DuPont furthered its fraudulent scheme.

Upon the *Bush Ranch* Plaintiffs' objections to the introduction of those summaries into evidence, DuPont was obliged, if it sought to pursue the introduction of the summaries into evidence, to raise Rule 1006 as a possible vehicle for such introduction. The *Bush Ranch* Plaintiffs clearly had no duty to nor interest in raising Rule 1006 as an "objection" to the summaries so as to give DuPont a possible assist in introducing evidence which was, on its face, contrary to the Plaintiffs' interests. Only if DuPont had raised Rule 1006 as a basis for the introduction of the summaries into evidence would the *Bush Ranch* Plaintiffs have had any incentive or need to invoke the remaining aspects of that Rule, i.e., their right to examine and/or copy the original underlying writings. Contrary to DuPont's argument, the evidence does not support a finding or conclusion that the *Bush Ranch* Plaintiffs' counsel made some strategic choice to forego use of or review of the Alta data and documents.

Finally, Rule 1006 emphasizes that the originals, or duplicates of the originals, *shall* be made available at a reasonable time and place. The *Bush Ranch* Plaintiffs were justified in relying on DuPont's obligations and promises to produce the Alta data and documents. The *Bush Ranch* Plaintiffs had no way of knowing prior to July 29, 1993, or August 2, 1993, that DuPont intended to introduce the summaries into evidence. Even if DuPont had made some offer to produce the Alta data and documents during the *Bush Ranch* trial, *which DuPont did not*, such production would not have satisfied the mandatory requirements of Rule 1006. In court, after the opposing party has rested and just prior to an effort to introduce the summaries through a witness who did

not prepare and who could not testify about the underlying data and documents, is *not* a reasonable time and place.

No evidence suggests that DuPont genuinely intended at any time to invoke Fed.R.Evid. 1006 as the basis for introducing the summaries into evidence through Mr. Albergo. DuPont never uttered "Rule 1006;" DuPont *never* offered, much less offered at a reasonable time and place, the *Bush Ranch* Plaintiffs an opportunity to examine and/or copy the Alta data and documents such that DuPont could invoke Rule 1006. DuPont clearly has created this Rule 1006 issue after an after-the-fact effort at justification for its wrongful conduct, and as such, its position in this regard is another DuPont subterfuge.

DuPont's Claims of Privilege

Dupont has contended that the Alta data was protected from disclosure by the attorney-client privilege and/or the work product privilege.

This Court takes judicial notice of all matters of record in the *Bush Ranch* cases, including but not limited to, all pleadings, all motions, all briefs, all memoranda, all hearing transcripts, all trial transcripts and all orders.

An expert bases his opinion or inference on "facts or data." *See* Fed.R.Evid. 703. Thus, Albergo, if he relied on the summaries prepared by Alta, also as a matter of law relied on the facts and data generated by these tests. The Court concludes that, as a matter of law, the data generated during and by the tests are facts, as opposed to a scientist's opinion formed after a review. Therefore, whether or not Mr. Albergo relied on them, the Alta data and documents were responsive to the *Bush Ranch* Plaintiffs' discovery requests, were subject to this Court's orders, were not protected or privileged, and had to be produced. Further, this Court concludes that, as a matter of law, an expert who relies on a summary of data or facts, by definition relies upon the underlying data and the facts which form the basis for the summary. Any other conclusion negates

the responsibility of the expert to demand, and then to form his opinion on, truthful and accurate information. *See Marsee v. United States Tobacco Co.*, 866 F.2d 319, 323 (10th Cir.1989) (pursuant to Rule 703, an expert relies upon *facts or data* when giving an opinion; such opinion is admissible only if it is based on facts that meet the criteria of the rule, that is, *facts* reasonably relied on by experts in the field).

Any summary of the Alta data and documents about which Albergo the expert was to form an opinion and testify was a summary which had to be based on facts. Stated otherwise, if Mr. Albergo relied on the *summary of facts* prepared by Alta, which a Rule 1006 summary must be, he relied on the data and documents underlying the summary, because a summary is, or should be, nothing more than a compilation of such facts. Because the Alta data and documents are facts, and/or because Albergo relied on the facts underlying the summary, which facts are the Alta tests and the data and documents generated thereby, the Alta data and documents had to be produced.

The case of *United States Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156 (E.D.N.Y.1994), is remarkably similar to this case as to this issue and is illustrative of this situation. There, the Court had to grapple with claims of attorney-client privilege as to data and documents generated by an engineering firm, Hart & Associates, and a consulting firm, Conestoga- Rovers, which together were hired to conduct environmental studies of soil, oversee remedial work and develop a supplementary remedial program. *See id.* at 161. The Court first stated that:

> [T]he attorney-client privilege may cover "communications made to agents of an attorney . . . hired to assist in the rendition of legal services." *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.1989), *cert. denied*, ___ U.S. ___, 112 S.Ct. 55, 116 L.Ed.2d 31 (1991); *United States v. Kovel*, 296 F.2d 918

(2d Cir.1961). In *Kovel*, Judge Friendly ruled that "the attorney-client privilege can attach to reports of third parties made at the request of the attorney or the client *where the purpose of the report was to put in usable form information obtained from the client.*" *Federal Trade Comm'n v. TRW, Inc.*, 628 F.2d 207, 212 (D.C.Cir.1980). The *Kovel* court "analogized the role of the accountant to that of a translator who puts the client's information into terms that the attorney can use effectively." *Id.*

As explained in 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* para. 503(a)(3)[01] at 503-31 to 38 (1993), the application of the privilege in *Kovel* is now recognized as extending to representatives of the attorney, such as accountants; administrative practitioners not admitted to the bar; and nontestifying experts. *See also* Edward M. Spiro & Caroline Rule, 'Kovel' Experts Cloaked by Attorney-Client Privilege, N.Y.L.J., Feb. 22, 1994, at S1, S10 (privilege has been applied to "communications with a psychiatrist assisting a lawyer in forming a defense, a bail bondsman, and a polygraph operator").

Neither Hart nor Conestoga-Rovers fall within any of these recognized categories of representatives or agents for purposes of the attorney-client privilege. They cannot be characterized as administrative practitioners since they were not employed by Phelps Dodge attorneys specifically to assist them in rendering legal advice. In fact, *they were hired by defendants to formulate a remediation plan acceptable to the NYSDEC and to oversee*

remedial work at the Property. Their function was not to put information gained from defendants into usable form for their attorneys to render legal advice, but rather, to collect information not obtainable directly from defendants. Nor could the consultant be characterized as non-testifying experts. Earlier in this case, when defendants attempted to shield from discovery studies prepared by Conestoga-Rovers and Gitlen for other clients, defendants denied that these consultants served as experts and stated that *if either consultant testified at trial,* it would *do so as a factual witness and not as an expert.*

* * * * *

Defendants have made a claim of attorney-client privilege that goes well beyond the "outer boundary" of the privilege. Unlike the computer study at issue in TRW, which arguably was undertaken to assist the attorneys in litigation, the studies and work performed by Hart and Conestoga-Rovers clearly served other purposes. *Moreover, these consultants based their opinions on factual and scientific evidence they generated through studies and collected through observation of the physical condition of the Property, information that did not come through client confidences. Such underlying factual data can never be protected by the attorney-client privilege and neither can the resulting opinions and recommendations. There are few, if any, conceivable circumstances where a scientist or engineer employed to gather data should be considered an agent within the scope of the privilege since the information collected will generally be*

> *factual, obtained from sources other than the client.*
>
> *Because employees of Hart and Conestoga-Rovers are outside the attorney-client privilege documents they have prepared are discoverable.*

(Emphasis supplied.) *United States Postal Service,* 852 F. Supp. at 161-62.

This Court concludes likewise. The Alta data and documents are *facts*, and thus, the data and documents should have been produced for all of the reasons set forth herein. Alta is not an agent of the attorneys such that any protection from production properly could be asserted. These *facts* are not protected by any privilege, be it attorney-client or the work-product doctrine. DuPont identified Alta and its principals Bethem and Petersen as fact witnesses and as persons with knowledge. DuPont represented, in arguing that this Court allow Mr. Albergo to testify about the Alta tests, that the Alta personnel were fact witnesses. DuPont represented in other courts that Bethem and Petersen were fact witnesses. As in *United States Postal Service,* Albergo was hired to formulate a remediation plan and Alta was hired to collect information. Their function was not merely to put information gained from DuPont into usable form such that the attorney could use the information effectively. Alta generated factual and scientific evidence through testing; it did not obtain information through client confidences. In producing documents upon which Albergo relied for his opinion, DuPont was obligated and under court order to produce the Alta data and documents.

"Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor, supra.* As the *Bush Ranch* cases developed, this Court held that either party could claim a protection from discovery based upon the work product doctrine only if the information or the documents for which such protection was asserted was properly identified in a timely prepared and served privilege

log. Moreover, as the *Bush Ranch* cases developed, this Court held that the Plaintiffs had shown "substantial need" for, and had required DuPont to produce *all* information and documents related to tests, the results of which would be used in the "defense" of the litigation. DuPont in fact waived its claim of work product protection to all information and documents related to *test results* which would be used in defense of the litigation.

DuPont did not assert on any log or at any other time a claim of work product protection as the basis for its non-production of the Alta data and documents. This Court did not alter its prior orders holding that the *Bush Ranch* Plaintiffs had shown substantial need for all information and documents related to tests where DuPont intended to use the results in defense of the litigation. DuPont did not retract its waiver of any claim of work product protection as to tests the results of which would be used in defense of the litigation. The Alta data and documents were not protected from production, therefore, on the ground of the work product doctrine. *See United States Postal Service, supra. See also* 4 Moore's Federal Practice § 26-66, at 26-403 to 26-406 (1991) ((1) factual portions of expert's report discoverable; (2) citing *E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del.1959), production of copies of memoranda and reports concerning the manner in which tests had been made is required; and (3) party engaging expert has no vested right in keeping secret any relevant *facts*).

The attorney-client privilege claim is invalid. The work product privilege claim is invalid.

DuPont's "They Didn't Ask for It" Defense

DuPont has contended that neither the discovery requests of the *Bush Ranch* Plaintiffs nor the orders of the Court required the production of the Alta data and documents and that since "they never asked for them" DuPont should not be faulted for not voluntarily producing them.

"It is well recognized that complete and accurate responses to discovery are imperative to the functioning of the modern trial process." *Averbach v. Rival Manufacturing Co.*, 879 F.2d 1196, 1201 (3rd Cir.1989), *cert. denied,* 493 U.S. 1023 (1989), citing *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir.1978) ("It is axiomatic that '[d]iscovery by interrogatory requires candor in responding.'" (quoting *Dollar v. Long Mfg., N.C.*, 561 F.2d 613, 616 (5th Cir.1977), *cert. denied,* 435 U.S. 996 (1978)). The *Averbach* Court continued:

> The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice giving, issue formulation and fact revelation were performed primarily and inadequately by the pleadings. . . . The new rules, however, invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device . . . to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus, civil trials in federal courts no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial. *Hickman v. Taylor,* 329 U.S. 495, 500-01, 67 S. Ct. 385, 388-89, 91 L. Ed. 451 (1947) (footnotes omitted). The "[m]odern instruments of discovery" are thus a principal means by which trials are rendered "less a game of blindman's buff [sic] and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Procter &*

> *Gamble Co.*, 356 U.S. 677, 682, 78 S. Ct. 983, 986, 2 L. Ed.2d 1077 (1958). *See generally* C. Wright & A. Miller, *Federal Practice and Procedure* § 2001 at 15 (1970) (describing purposes and uses of discovery).
>
> The Federal Rules themselves recognize the reliance aspect of discovery, permitting parties to request information inadmissible at trial where such request is "reasonably calculated to lead to the discovery of admissible evidence." See Fed.R.Civ.P. 26(b)(1). Discovery could not serve the function of triggering subsequent inquiry if parties were not entitled to rely on the results obtained at each step. *See Rozier*, 573 F.2d at 1345 ("Our system of civil litigation cannot function if parties . . . suppress information called for upon discovery.")

Averbach, 879 F.2d at 1201.

The *Averbach* Court concluded that a party "certainly cannot be faulted for failing to pry further by discovery into the very same inquiry aborted by [the defendant's] misleading answer." *Id.* at 1201. The same legal and common sense principle applies to this situation: where DuPont provided to the *Bush Ranch* Plaintiffs at Albergo's deposition a misleading summary which did not reflect the suspected positives where DuPont had agreed prior to and during Albergo's deposition to provide all of the data generated by and during the Alta tests of the *Bush Ranch* Plaintiffs' soils; where on July 28, 1993, DuPont belatedly produced to the *Bush Ranch* Plaintiffs, among numerous other documents including other laboratory summaries and some raw data, additional Alta summaries, but DuPont failed at that time to include any of the Alta data and documents which only subsequently came to light in the Hawaii litigation; where, in any event, DuPont did not have available in Columbus, Georgia, during the trial all of the Alta

data and documents, particularly those documents indicating the existence or presence of SUs in the *Bush Ranch* Plaintiffs' soils and those revealing DuPont's role in the creation of the misleading summaries; and where DuPont did not at any time after June 26, 1993, make available to Plaintiffs the Alta data and documents.

The *Averbach* Court discussed the duty of litigants to answer truthfully in discovery, and the propriety of opposing litigants to accept as true such answers and representations and then to act in reliance on such truthfulness.

> A litigant is entitled to accept answers to previous interrogatories as true, and to refrain from seeking additional discovery directed to the same issue. Because the Federal Rules of Civil Procedure are structured to elicit truthful answers given under oath, the opposing party, in circumstances such as presented here, may reasonably rely on interrogatory answers.
>
> The Fifth Circuit in *Rozier* faced an analogous issue. After concluding that Ford Motor Company falsely stated in answers to interrogatories that it possessed no reports of the type the plaintiff inquired about, the court held that a new trial was warranted under a timely Rule 60(b)(3) motion because of Ford's misrepresentation. The court stated that Ford's nondisclosure prevented plaintiff from fully and fairly presenting her case because "[i]nevitably, information developed in the discovery stages of the case influenced the decision as to which theories would be emphasized at trial." 573 F.2d at 1342. The court thus concluded that, "[w]e are left with the firm conviction that disclosure of the [requested information] would 'have made a difference in the way plaintiff's

> counsel approached the case or prepared for trial.'" *Id.* (citation omitted).
>
> We noted in our earlier opinion in this case that the purpose of asking for information under penalty of false swearing in the court of discovery and of responding to such requests is "self-evident." *Averbach,* 809 F.2d at 1020. If the appellate courts recognize the discovery responses are calculated to elicit reliance, certainly we must uphold the jury's specific finding that there was such reliance.

Averbach, 879 F.2d at 1201-02 (footnote omitted).

The *Bush Ranch* Plaintiffs had done all that any litigant reasonably can be expected to do to obtain the production of relevant information and to bring DuPont into compliance with this Court's orders. Numerous motions, briefs, letters, hearings, and orders attest to those facts. The *Bush Ranch* Plaintiffs were entitled to rely on the factual accuracy of DuPont's summary produced at Mr. Albergo's deposition, and DuPont's promises to produce the "hard copy" analytical data, on DuPont's agreements and promises in correspondence to produce all of the data and documents generated by the soils and waters tests, on DuPont's compliance with this Court's outstanding orders. Unfortunately, DuPont was not candid, and it did not comply. The evidence sought was encompassed within the discovery requests; it was required to be produced by the Court's orders and DuPont had promised that it would be produced. The *Bush Ranch* Plaintiffs were not then required to go to DuPont and ask on bended knee that it be produced. DuPont's "didn't ask" defense is not worthy of serious consideration.

In a case somewhat similar factually to the situation before this Court, though the relief sought was different, the Court of Appeals for the First Circuit discussed a defendant's failure to inform plaintiff or to produce to plaintiff information and documents evidencing contamination of property.

See Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir.1988). Numerous conclusions of law set forth there are applicable here.

(a) "In the case of intentional misconduct, as where the concealment was knowing and purposeful, it seems fair to presume that suppressed evidence would have damaged the nondisclosing party." *Id.* at 925, citing among other cases *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 217-19 (1st Cir.1982) (deliberate nonproduction or destruction of relevant documents is "evidence" that the party which has prevented production did so out of the well-founded fear that the contents would harm him).

(b) "It seems equally logical that where discovery material is deliberately suppressed, its absence can be presumed to have inhibited the unearthing of further admissible evidence adverse to the withholder, that is, to have substantially interfered with the aggrieved party's trial preparation. *See Alexander v. National Farmers Organization,* 687 F.2d 1173, 1205-06 (8th Cir.1982) (where documents deliberately destroyed, court should draw factual inferences adverse to party responsible); *Telectron, Inc. v. Overhead Door Corp.,* 116 F.R.D. 107, 134 (S.D. Fla.1987) (where destruction was motivated by "flagrant bad faith" conduct 'warrant[ed] the inference that the destroyed documents would have been harmful to [destroyer]'; resultant unavailability 'must therefore be seen as prejudicial to [innocent party's] interest in pursuing the full and fair litigation of its claims'); *National Association of Radiation Survivors v. Turnage,* 115 F.R.D. 543, 557 (N.D. Cal.1987) ('Where one party wrongfully denies another the evidence necessary to establish a fact in dispute, the court must draw the strongest allowable inferences in favor of the aggrieved party.')." *Anderson*, 862 F.2d at 925.

DuPont's "Releases" Defense

We have heretofore noted that while the *Bush Ranch* jury was deliberating the parties reached agreement on a

settlement, and releases were signed. DuPont has contended that these releases bar the parties instituting this show cause proceeding.

Neither the releases nor the pre-release agreement put in evidence by DuPont bar the Court from considering the fraud on the Court alleged in the petition. No agreement between private parties can deprive the Court of its power to conduct an investigation into and rendering rulings on an alleged fraud upon this Court. *See Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944); *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946). *See also Glover v. Southern Bell Telephone & Telegraph Co.*, 229 Ga. 874, 195 S.E.2d 11 (1972) (release only effective absent fraud). Further, the conduct alleged in the petition and in the memorandum/appendix in support, and the evidence of such conduct heard and seen by this Court, is not conduct "released" by the parties. The language contained in such releases and pre-release agreement does not contain language specifically releasing matters arising from the misconduct alleged. *See U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, 27 F.3d 521 (11th Cir.1994). *See also U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, 7 F.3d 986, 1004 (11th Cir.1993).

Due Process

Due process of law requires that sanctions "not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Roadway Express Inc. v. Piper*, 447 U.S. 752, 767 (1980) (footnote omitted), citing *Societe Internationale v. Rogers*, 357 U.S. 197, 208-212 (1958). DuPont received fair notice and has been afforded ample opportunity to be heard on the record. This Court has thoroughly reviewed and has given careful consideration to the evidence presented and to the arguments of counsel and to their post-hearing submissions. The Court is keenly aware of the seriousness of this matter. The Court concludes that due process of law has been afforded.

DuPont's Responsibility

Although it was the lawyers for the Dupont corporation whose acts of concealment and misrepresentation were the immediate cause of damage, the circumstances may justify imposition of sanctions on the corporation. *See Geller v. Randi,* 40 F.3d 1300, 1304-05 (D.C.Cir.1994).

Counsel's knowledge and behavior should be imputed to the client. The Supreme Court has said:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." *Smith v. Ayer,* 101 U.S. 320, 326, 25 L.Ed. 955.

Link v. Wabash Railroad Company, 370 U.S. 626, 633-34 (1962) (footnote omitted).

"Under elementary agency principles, a corporation is personified through the acts of its agents. Thus, the acts of its agents become the acts of the corporation as a single entity." *United States v. Hartley,* 678 F.2d 961, 970 (11th Cir.1982) (antitrust conspiracy case), *cert. denied,* 459 U.S. 1170 (1983). "[T]he general rule is that a principal is chargeable with and bound by the knowledge of his agent while acting within the scope of his authority." *First Ala. Bank v. First State Ins. Co., Inc.,* 899 F.2d 1045, 1061 n.8 (11th Cir.1990). The first and oldest theory explaining this general rule is in the legal identity

of the agent with the principal during the continuance of the agency. "In other words, the agent, while acting within the scope of his agency is, as to the matter embraced within the agency, the principal himself or the alter ego of the principal. *See* Holmes, *The Common Law*, 232 (1890)." *First Ala. Bank*, 899 F.2d at 1061 n. 8.

The evidence presented during the hearing on the petition revealed that DuPont was Alta's client and that DuPont paid Alta. The evidence revealed that Alta communicated with DuPont's counsel, Alston & Bird, with regard to the tests conducted, their use in the *Bush Ranch* litigation, and the manner of their presentation. The evidence also reveals that DuPont's scientist and legal liaison, Dr. David Johnson, was in the offices of Alston & Bird during the week or weeks during which expert depositions were scheduled, and that he was likely involved in meetings with Alston & Bird attorneys while conversations occurred involving such counsel and Alta. When questioned about contacts with DuPont with regard to the Alta data and documents, the DuPont witness invoked the attorney-client privilege, which, by implication, indicates that some communications occurred. At Albergo's deposition, DuPont's witness Albergo produced to the *Bush Ranch* Plaintiffs' counsel a document prepared by Alta and sent by facsimile to DuPont counsel, Alston & Bird. Alta entered into a confidentiality arrangement with DuPont counsel Alston & Bird. According to testimony at the hearing, DuPont had available in the courtroom during the *Bush Ranch* cases some of the disputed Alta data and documents. During this hearing, DuPont for the first time claimed Alta as a consultant rather than a fact witness.

Those facts mean that Alta was, at least for the purpose of conducting these tests and for the purposes of the matters raised in the petition, an agent for, or sufficiently under the control of, or in privity with, DuPont. Likewise, so was Alston & Bird. DuPont CEO, Mr. Woolard, acknowledged as much at the hearing on the show cause petition. DuPont is charged

with all of the knowledge which Alta and/or Alston & Bird possessed, and DuPont had sufficient possession, custody, or control over the Alta data and documents such that DuPont controlled the production, or non-production, of them. *See also Pesaplastic, C.A. v. Cincinnati Milacron Co.,* 799 F.2d 1510, 1521-22 (11th Cir.1986) (selective production of documents and ability to obtain documents place the documents within the party's possession, custody, and control).

The actions taken, and the statements made, by DuPont counsel and other representatives here in this court, and in other courts around the United States, properly may be considered in this matter pursuant to the doctrines and concepts of judicial and evidentiary admissions, estoppel and ratification. *See, e.g., LWT, Inc. v. Childers,* 19 F.3d 539 (10th Cir.1994) (inconsistent allegations contained in prior pleadings are admissible as evidence in subsequent litigation); *Pullman v. Bullard,* 44 F.2d 347 (5th Cir.1930) (admissions in pleadings may be admitted into evidence and, unless withdrawn or stricken, may work an estoppel to deny them on the party making them); *W.T. Harvey Lumber Co. v. J.M. Wells Lumber Co., Inc.,* 104 Ga.App. 498, 122 S.E.2d 143 (1961) (attorney is such an agent of client that his declarations made during the course of his employment may be offered against his principal); *Everitt v. Harris,* 67 Ga.App. 64, 19 S.E.2d 545 (1942) (letter written by attorney on behalf of client may be considered as an admission by client); *Jabaley v. Jabaley,* 208 Ga.App. 179, 430 S.E.2d 119 (1993) (admissions can be found in motions); *Foster v. State,* 157 Ga.App. 554, 278 S.E.2d 136 (1981) (admissions in one action can be evidence in another action); *Cox v. Administrator,* 17 F.3d 1386 (11th Cir.1994) (principal can ratify even the unauthorized act of an agent purportedly done on behalf of principal either expressly or by implication through conduct that is inconsistent with an intent to repudiate the unauthorized act; proof of authorization or ratification can be through circumstantial evidence, and all that need to be shown is knowing tolerance), *modified,* 30 F.3d 1347 (11th Cir.1994); *Computel, Inc. v. Emery Air Freight*

Corp., 919 F.2d 678 (11th Cir.1990) (under general agency rules a corporation (principal) will be vicariously liable for wrongful acts of employees (agents) when the acts are related to and within the course of employment, committed in furtherance of the corporation's business, and authorized or subsequently acquiesced in by the corporation). *See also* Fed. R. Evid. 801(d)(1) and (d)(2); O.C.G.A. §§ 24-3-30, 24-3-34, and 24-4-24.

This Court views the statements and representations made by DuPont counsel and representatives, and the conduct shown by same, as evidentiary admissions subject to rebuttal. However, as regards rebuttal, as the findings here make clear, this Court finds and concludes that DuPont, through its representatives, agents, and/or counsel, is not credible as to the issues surrounding the Alta data and documents. Thus, DuPont's statements, representations and conduct support the Petitioners' contention that DuPont has violated this Court's orders and has committed a fraud upon this Court.

The Court found that DuPont had directed the progress of the *Bush Ranch* cases. The Court also reiterates that DuPont's CEO testified before this Court during the hearing on the present petition and he testified that he had been made aware of this Court's orders throughout the *Bush Ranch* cases and that now, *today*, he fully supports the actions taken by and the conduct of DuPont's representatives, agents, and/or counsel. Moreover, Mr. Woolard acknowledged that the responsibility for all such statements, representations and conduct rests with DuPont. *In so doing, DuPont has endorsed, authorized, directed, acquiesced in, and ratified what happened here.*

As applied to this matter, the Court concludes that, because both Alta and DuPont's counsel Alston & Bird had knowledge of the Alta information, and the possession of the Alta data and documents, DuPont had actual or constructive knowledge of the information contained in, and had actual or constructive possession of, the Alta data and documents, from

prior to Albergo's deposition through and including trial. Both Alta and Alston & Bird ultimately were employed by and/or paid by DuPont. During the hearing on the petition, DuPont witnesses invoked an attorney-client privilege when questioned about whether local counsel had discussed the Alta data and documents with DuPont Legal Department. The Alta data and documents were subject to seasonably propounded discovery requests, Court orders, and/or agreements between and among the parties. DuPont consciously, and, therefore, knowingly, purposefully, deliberately, willfully and in bad faith, concealed and suppressed the information and documents. This misconduct gives rise to a rebuttable presumption that the suppressed information and evidence would have led to other admissible evidence and that both the suppressed information and other evidence which may have been discovered would have been adverse to DuPont. DuPont has not rebutted this presumption and has not shown by clear and convincing evidence that its nondisclosure was unintentional or that the withheld material was inconsequential. In fact, credible testimony reveals that different scientists can reach and have reached different conclusions and could form and have formed different opinions with respect to the Alta data and documents. Other Courts have found that such other conclusions and opinions exist and have validity. DuPont witnesses, during the hearing on the show cause order, admitted that the matters revealed in, by and through the Alta data and documents were a subject of scientific debate and a question for the jury upon the presentation of both sides. The evidence and DuPont's admissions make it clear that the Alta data and documents were manifestly relevant to the *Bush Ranch* cases. Thus, contrary to rebutting the presumption, the clear and convincing evidence reveals that the Alta data and documents were of significant consequence and that DuPont's wrongful failure to produce the data and documents prejudiced the *Bush Ranch* Plaintiffs. *See also* O.C.G.A. § 24-4-22. The evidence also clearly reveals that not only did DuPont not make all reasonable efforts to comply with the Court's orders requiring the production of the

Alta data and documents, it also consciously, willfully, intentionally, and deliberately withheld and concealed that data and documents. Rather, if DuPont is to be believed, it caused and allowed that data and those documents, or part of them, to sit undisclosed in a box in the courtroom. To this date, neither the box nor the Alta data and documents have been produced by DuPont to this Court for the Court's examination and review. Were it not for Petitioners having discovered the existence of that data and those documents and having brought them in for this Court to review, DuPont's fraud on this Court would have gone undiscovered.

The Precedents

During the numerous hearings which were held prior to the *Bush Ranch* trial, in an effort to bring DuPont into compliance with its discovery obligation, the Court emphasized the egregiousness of DuPont's conduct and the prejudice the *Bush Ranch* Plaintiffs had suffered on account of it. The Court imposed monetary sanctions of $500,000.00, which were later increased to $1,000,000.00, which amounts were subject to reconsideration, upward or downward, depending on DuPont's conduct. The Court informed DuPont that the Court was seriously considering the sanction of default or of striking DuPont's answer. In the face of all of the above, and more, DuPont still did not produce the Alta data and documents, which directly and critically concerned the presence of SUs in the *Bush Ranch* Plaintiffs' soils and waters that allegedly were present there due to the contamination of Benlate, or benomyl, by DuPont's SUs. This Court gives *no* credence to DuPont's arguments that the Court's orders did not encompass the Alta data and documents, or that those orders were vague, or that DuPont reasonably misunderstood the orders. In fact, those arguments seem little more than a continuation of the fraud on this Court.

In this situation there is ample precedent for the imposition of sanctions. We have earlier made reference to the decision of the Court of Appeals for the Eleventh Circuit in

Malautea v. Suzuki Motor Co., Ltd., supra. In that case the District Court outlined the various methods whereby the Defendants resisted discovery, and it will be noted that they were remarkably similar to the methods used by DuPont in this case. The District Court chose to strike the Defendants' answers and entered a default judgment against them on the issue of liability. In the Court of Appeals the Defendants argued that the suppressed evidence referred to by the District Court was not encompassed by the Court's discovery orders, that the discovery orders were vague, and that any failure to comply was simply a misunderstanding which, of course, are the same arguments made by DuPont in this case.

The Court of Appeals affirmed the decision of the District Court. The Court of Appeals for the Eleventh Circuit likewise affirmed the District Court's imposition of sanctions in *BankAtlantic v. Blythe Eastman Paine Webber,* 12 F.3d 1045 (11th Cir.1994). In that case the defendant, Paine Webber, promised during a hearing on a motion to compel, like DuPont through local and in-house counsel promised during an in-chambers hearing in the *Bush Ranch* cases, to produce *all* documents in its custody, control or possession relating to an issue before the Court. *See id.* at 1047. The *BankAtlantic* Court relied on Paine Webber's representations, just as this Court has repeatedly relied on DuPont's representations, including those made by DuPont's CEO. Paine Webber argued that no court order directed it to produce the documents in dispute, that BankAtlantic had proved no prejudice, that BankAtlantic had failed to show that the documents were in Paine Webber's possession and that the documents were irrelevant and immaterial. *See id.* at 1048. The District Court found against Paine Webber's arguments and imposed sanctions.

In its opinion the Court of Appeals first observed that "'the standard of review for an appellate court in considering an appeal of sanctions under Rule 37 is sharply limited to a search for an abuse of discretion and a determination that the

findings of the trial court are fully supported by the record.'" *Id.* at 1048, quoting *Pesaplastic C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510, 1519 (11th Cir.1986). The Court also cited *Carlucci v. Piper Aircraft Corp., Inc.*, 775 F.2d 1440, 1446-47 (11th Cir.1985), for the proposition that federal courts have inherent power to impose appropriate sanctions for a party's failure to comply with court orders. *BankAtlantic*, 12 F.3d at 1048.

The District Court found, and the Court of Appeals affirmed the finding, that Paine Webber's counsel failed to meet its obligation to search Paine Webber's corporate files and that counsel acted in complete disregard of its responsibilities. The District Court found that Paine Webber had custody and control over the documents at issue such that the documents should have been produced. The District Court found the concealed documents manifestly relevant and concluded that BankAtlantic's learning of the discovery violation on the eve of trial prejudiced the plaintiff. The Court of Appeals affirmed these findings.

This Court ordered DuPont to produce *all* Benlate-related documents. DuPont represented to this Court that it would produce *all* Benlate related documents. DuPont represented to the *Bush Ranch* Plaintiffs that, if it were allowed to come onto the *Bush Ranch* Plaintiffs' properties to obtain samples for testing, it would produce to them *all* materials generated as a consequence of that testing. DuPont had access to and had custody and control of the Alta data and documents from mid-June, when the testing began, forward. The Alta data and documents should have been produced. That they were not produced violated this Court's orders. The Alta data and documents were manifestly relevant, and DuPont's failure to produce them clearly prejudiced the *Bush Ranch* Plaintiffs' opportunity to obtain a fair trial and denied them a fair trial. At a minimum, the *Bush Ranch* Plaintiffs were deprived of an opportunity to review the Alta data and documents, to obtain scientific review of same, to present testimony and/or

cross-examine witnesses about the significance of the suspected positive findings and the detection limits changes, and to argue to the jury about the meaning of the evidence. Had the Alta data and documents been produced, DuPont could not have argued to the Court and to the jury that *no* evidence existed which showed the presence of DuPont's SUs in the *Bush Ranch* Plaintiffs' soils and waters. DuPont's failure to come into compliance with the Court's discovery and sanctions orders is now manifest, contrary to DuPont's untrue representations which were made to this Court in a motion to vacate submitted at the end of the *Bush Ranch* trial. This Court engaged in the judicial act of vacating its orders and the sanctions imposed there, in reliance on the truthfulness of DuPont's representations. DuPont's fraudulent conduct warrants severe sanctions.

CONCLUSION

Having heard and reviewed all of the relevant evidence, the Court concludes that DuPont, in light of the hundreds of claims and lawsuits which had arisen out of the use of its product Benlate 50DF, decided that it would not reveal the potentially damaging evidence generated by the Alta tests. DuPont was faced with a difficult decision on the eve of the first Benlate-related trial—to produce data and documents which would authorize a jury to conclude that the *Bush Ranch* Plaintiffs' soils and waters contained DuPont SUs, data and documents which by their use in the *Bush Ranch* case would be available to claimants and plaintiffs all over the United States, or to conceal that data and those documents. DuPont made the wrong choice.

DuPont consciously and deliberately withheld the Alta data and documents from the Plaintiffs and the Court, and perhaps even from the witness Albergo, thereby withholding this information from future litigants as well. DuPont urged falsely to the Court and elicited false testimony about what Albergo had done, and what he knew, and what the evidence, in fact, arguably showed. DuPont deprived the Plaintiffs, the

Court, and the jury of data and documents highly relevant to the issue which DuPont itself described as the most critical issue in the case. DuPont continued its concealment and deception to the extent of presenting to this Court knowingly untrue representations about DuPont's compliance with its discovery obligations and with this Court's orders with the accomplished purpose of fraudulently obtaining an untrue order from this Court to absolve DuPont of its misconduct, and to relieve DuPont of sanctions it richly deserved.

DuPont's conduct with regard to the Alta data and documents, beginning with conduct prior to Mr. Albergo's deposition, and continuing through the *Bush Ranch* trial and to the present, was willful, deliberate, conscious, purposeful, deceitful, and in bad faith. That conduct affected the fairness of the trial and prevented the full and fair presentation and consideration of the evidence. DuPont's conduct affected the course of the *Bush Ranch* trial from beginning to end—from opening statement to closing argument. DuPont's conduct affected the *Bush Ranch* Plaintiffs' trial preparation and trial conduct. DuPont's conduct affected the rulings and the orders of this Court and interfered with the administration of justice. In short, DuPont's conduct deprived the *Bush Ranch* Plaintiffs of a fair trial and made that trial, which lasted approximately six weeks and which consumed vast judicial resources, a farce. This Court has the power, authority, and jurisdiction to address such wrongful conduct.

DuPont's conduct was and, in fact, remained during the hearing on the present petition, subject to censure. It has shown a lack of respect for the civil justice system in general, which disrespect was evidenced by the attitude of DuPont's CEO, Mr. Edgar Woolard, that, and the Court paraphrases, "When DuPont says what the science means, that is what the science is." No party, be it an individual or a corporation, can disregard the authority of the judicial branch and disempower the American jury. No party, be it an individual or a corporation, can unilaterally *decide* the evidence.

Put in layperson's terms, DuPont cheated. And it cheated consciously, deliberately and with purpose. DuPont has committed a fraud on this Court, and this Court concludes that DuPont should be, indeed must be, severely sanctioned if the integrity of the Court system is to be preserved.

As is this Court's practice, at the close of the Show Cause hearing, the parties were directed to submit to the Court findings of fact and conclusions of law, which each party would propose that the Court enter as its final findings of fact and conclusions of law. Each party has submitted extensive proposed findings of fact and conclusions of law which the Court has carefully considered. Following such consideration, the Court finds that DuPont's proposed findings of fact and conclusions of law are generally a continuation of the discredited positions urged during the hearing. On the other hand, the Court finds that the proposed findings of fact and conclusions of law submitted by the Petitioners are essentially trustworthy and correct and, though while not adopting them in their entirety, the Court has relied heavily upon them and, where consistent with the Court's findings, has adopted many of them as proposed.

Consistent with the foregoing, the Court assesses the following sanctions and enters the following orders:

1. Dupont is directed to send a copy of this opinion and order to each Plaintiff who filed an action against DuPont in this court and is also directed to deliver to each such Plaintiff a complete copy of all of the Alta data and documents which were withheld from production in this court by DuPont. This action by DuPont shall be completed within 15 days from the date of entry of this order.

2(a). On July 6, 1995, the Court directed Petitioners' counsel in the underlying *Bush Ranch* cases to file with the Court a verified statement of the pretrial and trial expenses incurred by the Plaintiffs in those cases and in all cases that were consolidated for discovery in this court which were paid by the Plaintiffs through their counsel. Plaintiffs' counsel in

the *Bush Ranch* cases were further directed to file with the Court a verified statement of the legal fees incurred and paid by the Plaintiffs in all of the consolidated cases. Pursuant to those directions the Court has received a statement of the amounts requested properly verified and the Court now determines that the Plaintiffs in the underlying cases have paid through their counsel in connection with the preparation for and the trial of the underlying cases an amount of $6,843,837.53.

For its discovery abuses in the underlying and consolidated cases, which abuses prolonged the trial of those cases and made a mockery of the preparation for and the conduct of that trial, the Court assesses a sanction against DuPont in the amount of $6,843,837.53.

2(b). The Court determines that an amount equal to that immediately above specified in paragraph (a), that being $6,843,837.53, should be paid by DuPont as a sanction for the wasted time, inconvenience, and waste of judicial resources inflicted upon the Court and the jury for the pretrial and trial of the consolidated cases.

DuPont is directed to pay the total amount of the sanctions imposed in the above paragraphs (a) and (b), that amount being $13,687,675.06 into the registry of this court within 15 days from the date of the entry of this order.

3. For its contempt of this Court in obtaining the entry of the order of August 16, 1993, vacating prior discovery orders of this Court which had been entered in the consolidated cases, and for its continuing contempt evidenced in the show cause hearing, the Court, as a sanction for that civil contempt:

a) Vacates the order entered in the consolidated cases on August 16, 1993, and reinstates all orders finding discovery abuse by DuPont and imposing sanctions on DuPont prior to the trial of the consolidated cases. One of those orders so reinstated assesses a sanction of $1,000,000.00 against DuPont for the discovery abuse; and

b) Assesses a sanction against DuPont in the amount of $100,000,000.00.

The Court observes that DuPont in the past has been unresponsive to and unimpressed by previous impositions of sanctions in amounts of $500,000.00 and $1,000,000.00 and perhaps the amount of this sanction will not be sufficient to make an impression on the Respondent, but it is hoped that it will be sufficient to make a party, even with the financial resources possessed by DuPont, responsive to and respectful of the judicial system of the United States. By entering the monetary sanctions set forth herein it is the Court's purpose to deter DuPont and others who might likewise engage in such misconduct from engaging in such egregious discovery practices in the future and to deter it and others from committing similar frauds upon this or any other Court.

The Court takes judicial notice of a commonly known fact (which was referred to during the testimony of DuPont's Chief Executive Officer) that while the hearing in this matter was in progress DuPont caused to be published in the *Wall Street Journal*[1] a full page advertisement which contained the following statement:

> **We categorically deny any and all allegations that DuPont has improperly withheld information, either in the courtroom or elsewhere. From the outset of this unfortunate situation, we have acted honorably, within the judicial process, with our customers, and in full accord with the law.**

The Court will permit DuPont to purge itself of the $1,000,000.00 sanction imposed by Section 3(a) above and the $100,000,000.00 sanction imposed by Section 3(b) above by complying with all of the other orders herein imposed upon

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[1]Wall Street Journal, May 5, 1995, Section A, p. 5.

DuPont and by further publishing a full page advertisement in the *Wall Street Journal* and in the most widely circulated newspaper in the state of Georgia and in the state of Alabama and in the state of Michigan, acknowledging its wrongdoing and giving notice of these orders and sanctions in a form to be approved by the Court. These publications to occur within 20 days of the date of this order. DuPont is required to elect whether or not to purge the sanctions referred to within 15 days of the date of this order and to notify the Court of its election within that time, and if it elects not to purge the sanctions then DuPont is directed to deposit into the registry of the court the total of the two sanctions, that being $101,000,000.00, within 15 days of the date of this order.

4. DuPont is directed to file on or before 25 days from the date of this order a certificate of compliance signed by its Chief Executive Officer stating that DuPont is in full compliance with all sections of this order. For each day thereafter that DuPont is not in compliance with all of the terms of this order DuPont will be directed to pay into the registry of this court, as a further sanction for its fraud upon this Court and for its noncompliance with the provisions of this order, an amount of $30,000 per day until such certificate of compliance is so filed by its Chief Executive Officer and such compliance has in fact been accomplished.

In the post-hearing submissions to the Court the Petitioners have suggested that the Court receive input from the Petitioners concerning the potential disposition of any funds received by the Court as a result of any monetary sanction or sanctions which might be imposed by the Court, such disposition to possibly include a number of public purposes as well as those persons and entities directly affected by DuPont's conduct. The Court will hereafter set a hearing date at which it will address, among other things, disposition of any funds ordered paid by DuPont into the registry of the court, and the assessment of court costs, attorneys fees, and expenses

associated with this show cause proceeding and imposition of sanctions.

This order is an interim order and not a final order, and the Court hereby expressly reserves jurisdiction over the parties and all matters herein pending further orders of this court.

IT IS SO ORDERED, this 21st day of August, 1995.

/s/ J. Robert Elliott

UNITED STATES DISTRICT JUDGE

[filed March 22, 1995]

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE: E.I. DU PONT DE NEMOURS & COMPANY—
BENLATE LITIGATION:

THE BUSH RANCH, INC., a Georgia corporation, and WILLIAM R. LAWSON, Individually;

YELLOW RIVER GROWERS, a partnership whose partners are Roy Phillip Barber, Carol H. Barber and Gregory Phillip Barber, and ROY PHILLIP BARBER and CAROL H. BARBER; and

C. RAKER & SONS, INC.,
a Michigan Corporation,

Petitioners

v.

E. I. DU PONT DE NEMOURS & COMPANY, a Delaware Corporation,

Respondent

Civil Action
No. 95-36-COL

PETITION

Come now Petitioners and file this Petition against E. I. Du Pont de Nemours & Company, Respondent (hereinafter "Du Pont" or "Respondent"), and show as follows:

1.

Petitioner The Bush Ranch, Inc., is a Georgia corporation with its principal office and place of business at 124 Woodland Drive, Thomasville, Thomas County, Georgia, and is a citizen of the State of Georgia. Petitioner William R. Lawson is a citizen of the State of Georgia, residing at 1205 Riftwood Lane, Thomasville, Thomas County, Georgia.

2.

Petitioner Yellow River Growers, an Alabama partnership with a principal place of business in Covington County, Alabama, composed of general partners Roy Phillip Barber, Carol H. Barber and Gregory Phillip Barber, all are residents and citizens of the State of Alabama, residing at Route 1, Dozier, Covington County, Alabama.

3.

Petitioner C. Raker & Sons, Inc., is a Michigan Corporation with its principal office and place of business at 10371 Rainey Road, Litchfield, Hillsdale County, Michigan, and is a citizen of the State of Michigan.

4.

Du Pont is a Delaware corporation with its principal office at 1007 Market Street, Wilmington, Delaware 19898, and is a citizen of the State of Delaware.

5.

Du Pont is registered and qualified to do business in this state, maintains a place of business and does business in this district and in this state, and a substantial part of the conduct giving rise to this Petition occurred in this state, in this Judicial District and in this Court. Respondent maintains a Registered Agent for service of process in this state, C.T. Corporation System, 1201 Peachtree Street, N.E., Suite 1240 Atlanta, Georgia 30361.

6.

Jurisdiction and venue are proper in this United States District Court, Middle District of Georgia, pursuant to 28 U.S.C. § 1651 and 18 U.S.C. § 401, in that the conduct which is the subject of this petition occurred pre-trial, at trial and post-trial, and also involved bad faith and flagrant disregard of Fed. R. Civ. P. 11, 26, 33, 34 and 37, and bad faith and flagrant violations of Orders entered by this Court, so as to necessitate invoking the inherent powers of this Court to sanction such conduct.

7.

Petitioners herein were formerly Plaintiffs in lawsuits previously pending in this Court against Du Pont involving Petitioners' use of a fungicide manufactured by Respondent, known as Benlate. Those lawsuits were captioned as follows:

The Bush Ranch, Inc., a Georgia corporation and William R. Lawson, Individually v. E. I. Du Pont de Nemours & Company, a Delaware corporation, Civil Action File No. 92-33-COL;

Yellow River Growers, a partnership whose partners are Roy Phillip Barber, Carol H. Barber and Gregory Phillip Barber, and Roy Phillip Barber and Carol H. Barber v. E. I. Du Pont de Nemours & Company, a Delaware corporation, Civil Action File No. 92-34-COL; and

C. Raker & Sons, Inc., a Michigan corporation v. E. I. Du Pont de Nemours & Company, a Delaware corporation, Civil Action File No. 92-40-COL.

The aforesaid lawsuits and a lawsuit identified as *Warren E. Kobatake, individually, and Pleasonton Corporation, a Hawaii corporation v. E. I. Du Pont de Nemours & Company, a Delaware corporation*, Civil Action File No. 92-132-COL were consolidated for purposes of discovery and trial (hereinafter "consolidated cases"). The

Plaintiffs in the consolidated cases sought compensatory and exemplary/punitive damages from Du Pont for injuries and damages sustained by them resulting from use of the fungicide Benlate manufactured by Du Pont. Ten other lawsuits were filed in this Court against Du Pont arising out of similar occurrences, which were consolidated for purposes of discovery with the consolidated cases referenced above and nine of which have, as have the consolidated cases, been dismissed with prejudice. Among the causes of action alleged by the Plaintiffs in the consolidated cases, and in the other cases filed in this Court, was that Du Pont engaged in a continuing fraudulent scheme concerning Benlate, and that Du Pont's fraudulent course of conduct regarding its said product hindered, delayed and obstructed knowledge of and the presentation of claims and demands against Du Pont by Petitioners herein, and others.

8.

After months of extensive investigation and preparation for trail which included extremely protracted and arduous discovery involving innumerable obstructive tactics by Du Pont and its attorneys, of which this Court is fully aware because of its involvement with the consolidated cases from their initial filings, the consolidated cases were voluntarily dismissed with prejudice. Prior to such dismissals, the consolidated cases were tried before this Court and a jury. After the conclusion of all evidence, closing arguments by counsel for the parties, charge to the jury by the Court, and while the jury was deliberating, the parties agreed to a settlement of the consolidated cases. Nine of the other ten cases were also settled at that time. Voluntary dismissals with prejudice were entered in the consolidated cases, as well as nine of the other ten cases pending in this Court against Du Pont. Releases were also executed by all of these Petitioners.

9.

As alleged by Plaintiffs in the consolidated cases, Du Pont's acts and conduct were then and continue to be national in scope and have caused injuries and damages nationwide. At the time of the trial of the consolidated cases, hundreds of lawsuits and other claims were pending throughout the United States against Du Pont based upon claimed injuries and damages resulting from the use of Benlate. Since the trial of the consolidated cases began on July 6, 1993, numerous other lawsuits and claims have been terminated via settlement, dismissal or trial by jury. The consolidated cases were the first Benlate cases involving claims of sulfonylurea contamination in the United States to be tried before a jury, and many other plaintiffs and claimants or their attorneys either attended the trial of the consolidated cases or closely monitored the presentation of evidence during said trial.

10.

Plaintiffs in the consolidated cases all contended that Benlate was defective and contaminated by a class of chemicals known as sulfonylureas, which are extremely toxic herbicides, and that the sulfonylureas which contaminated the Benlate used by the Plaintiffs in the consolidated cases were also manufactured by Du Pont. The issue for trial in the consolidated cases was whether Du Pont's product, Benlate, was contaminated by highly toxic herbicides known as sulfonylureas. The most critical evidence in the trial of the consolidated cases was whether sulfonylureas manufactured by Du Pont were present in the Benlate, soils and/or waters of the Plaintiffs. Prior to trial, Du Pont had tests conducted of each of Petitioner's soils and waters and had evidence that sulfonylureas were in Petitioners' soils and waters, but Du Pont did not thereafter reveal that evidence and falsely represented that the test data and documents contained no evidence of sulfonylureas in Petitioners' soils and waters.

11.

Contemporaneously herewith Petitioners file a Memorandum/Appendix in Support of Petition. This Memorandum/Appendix fully sets forth and discloses what Petitioners have discovered to date through diligent and timely investigation of what appears to be Du Pont's willful, unconscionable, and fraudulent plan or scheme to conceal and suppress evidence relevant to this most critical issue, designed to influence improperly the conduct and outcome of the consolidated cases prior to, during, and subsequent to the trial of Petitioners' lawsuits and to disregard flagrantly the heretofore mentioned Federal Rules, Du Pont's duties and obligations of good faith and the orders of this Court throughout the pendency and trial of the consolidated cases, such conduct being unknown to Plaintiffs at the time of the execution of the releases and the dismissals of the cases.

12.

The investigation of the evidence presented in *Kawamata Farms, Inc. v. United Agri Products, et al.*, Civil Action No. 91-437, tried before a jury in the Circuit Court of the Third Circuit, State of Hawaii, and other investigations conducted by Petitioners herein, reveals that the course of conduct by Du Pont throughout the pendency and trial of the consolidated cases clearly demonstrates systematic and intentional bad faith by Du Pont designed to defraud not only the Plaintiffs in the consolidated cases, but also the Court before whom those cases were tried, and all other Benlate claimants, and such conduct has resulted in defiling the integrity of this Court and the entire judicial system, and prejudice not only to the Plaintiffs in the consolidated cases, but to all parties which have been injured or damaged by Du Pont's Benlate.

13.

Petitioners show that Du Pont has engaged in a course of conduct constituting a fraud upon this Court and a

fraud upon the Plaintiffs in the consolidated cases, and upon other Benlate claimants, which prevented Plaintiffs from fully and fairly presenting their cases to the jury and this Court, and has adversely influenced other Benlate claimants including the plaintiffs in the other Benlate cases filed in this Court who settled their claims and dismissed their cases.

14.

There is a compelling need for this Court to inquire into and investigate the conduct of Du Pont, its agents and representatives, in order to protect the due and orderly administration of justice, and to maintain the authority and the dignity of this Court, and the right to a fair trial for litigants in this Court.

15.

This Court has the inherent power to levy sanctions for abusive, obstructive and fraudulent litigation practices in discovery and trial in the cases before it. This Court has the inherent power to levy sanctions for willful disobedience of its orders. This Court possesses the inherent authority to enter all other necessary orders to sanction Du Pont's past conduct, to sanction Du Pont for defiling the integrity of this Court, to sanction Du Pont for disobedience of this Court's orders, and to correct other bad faith misconduct by Du Pont and its agents.

16.

Petitioners herein further show that they do not wish, and are in no position financially, to vacate any of the settlements previously made with Du Pont, that Du Pont, by its conduct, is estopped from seeking to set aside such settlements, and that such settlements should not be set aside. Moreover, the releases executed by Petitioners have no bearing on the issues set forth in this Petition. This Court may sanction the wrongs committed against it and all plaintiffs without setting aside those settlements, pursuant to

the inherent power of this Court to impose such a condition as a part of any sanctions to be entered.

WHEREFORE, Petitioners respectfully petition:

(a) That Respondent Du Pont be served with this Petition in accordance with law;

(b) That this Court find that a fraud has been practiced upon it by Respondent Du Pont and that the system of justice has been corrupted;

(c) That all Petitioners continue to be allowed to rely upon the settlements reached in the consolidated cases, and that no orders or sanctions be entered which would require a return of the consideration received through such settlements;

(d) That this Court enter Orders sanctioning Respondent Du Pont for its fraud on this Court, obstruction of justice and disobedience of this Court's Discovery Orders;

(e) That such sanctions be assessed against Respondent Du Pont in an amount sufficient to uphold and maintain the integrity and dignity of this Court;

(f) That Respondent Du Pont be required to notify, as directed by this Court, all parties in all lawsuits pending against it at the time of the dismissal of the consolidated cases or filed subsequently thereto, arising out of the use or application of Benalte, of these proceedings;

(g) That Petitioners be awarded attorneys' fees and costs, as the court may deem reasonable, for their prosecution of this Petition as an additional sanction against Respondent Du Pont for its misconduct;

(h) That an Order issue to Respondent Du Pont requiring it to show cause on a day certain why the imposition of sanctions and other relief against Du Pont should not be granted; and

(i) That such other and further relief be granted as the Court may deem just and equitable in the premises.

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[Filed August 16, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE: E.I. DU PONT DE NEMOURS & COMPANY
BENLATE LITIGATION:

THE BUSH RANCH, INC. a Georgia corporation, and WILLIAM R. LAWSON, Individually,

Plaintiffs

v.

E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant

Civil Action
File No. 92-33-COL

YELLOW RIVER GROWERS, a partnership whose partners are Roy Phillip Barber, Carol H. Barber and Gregory Phillip Barber, and ROY PHILLIP BARBER and CAROL H. BARBER,

Plaintiffs

v.

E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant

Civil Action
File No. 92-34-COL

C. RAKER & SONS, INC., a Michigan corporation,

Plaintiff

v.

E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant

Civil Action
File No. 92-40-COL

WARREN E. KOBATAKE, individually and PLEASONTON CORPORATION, a Hawaii Corporation,

Plaintiff

v.

E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant

Civil Action
File No. 92-132-COL

JOINT MOTION AND SUPPORTING MEMORANDUM OF PLAINTIFFS AND DEFENDANT FOR AN ORDER VACATING PRIOR DISCOVERY ORDERS AND SANCTIONS

The parties in the above-styled cases have settled their differences after a lengthy trial and approximately a year and a half of very active discovery. During the course of discovery, there have been frequent discovery disputes. Those discovery disputes were eventually resolved between the parties.

In light of these events, the parties jointly move the Court to vacate the prior discovery orders and sanctions.

Federal law favors and encourages settlements. *E.g., In re U.S. Oil and Gas Litigation*, 967 F.2d 489 (11th Cir. 1992). Obviously, the resolution by parties of discovery disputes is favored, as well.

Here, in the course of working out their difficulties during litigation, the parties have resolved all discovery disputes. Plaintiffs agree that the Defendant is in compliance with the Court's Orders. There can be no doubt that the Court has questioned Du Pont's compliance with discovery obligations. At the same time, it must be recognized that the burdens of discovery in this case were unparalleled. The Court always noted that the monetary sanctions would be contingent on Du Pont's efforts to comply in the future. Plaintiffs have agreed that, during the course of the case, Du Pont did come in compliance with the Court's Orders and its discovery obligations.

Accordingly, the parties jointly move that the Court vacate all sanctions, including monetary sanctions, and vacate its Orders of June 24, 1992, September 25, 1992, October 15, 1992, November 17, 1992, December 10, 1992, March 15, 1993, April 14, 1993, June 6, 1993 and June 15, 1993.

Attached hereto is a joint proposed Order granting the relief requested.

This 16th day of August, 1993.

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[Filed August 16, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE: E.I. DU PONT DE NEMOURS & COMPANY
BENLATE LITIGATION:

THE BUSH RANCH INC. a Georgia corporation, and WILLIAM R. LAWSON, Individually,

Plaintiffs

v.

E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant

Civil Action
File No. 92-33-COL

YELLOW RIVER GROWERS, a partnership whose partners are Roy Phillip Barber, Carol H. Barber and Gregory Phillip Barber, and ROY PHILLIP BARBER and CAROL H. BARBER,

PLAINTIFFS

v.

E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant

Civil Action
File No. 92-34-COL

C. RAKER & SONS, INC., a Michigan corporation,

Plaintiff

v.

E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant

Civil Action
File No. 92-40-COL

WARREN E. KOBATAKE, individually and PLEASONTON CORPORATION, a Hawaii Corporation,

Plaintiff

v.

E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant

Civil Action
File No. 92-132-COL

ORDER

The Court GRANTS the parties' Joint Motion to Vacate Prior Discovery Orders and Sanctions.

The Court has issued several orders relating to discovery in these cases, including the Orders of June 24, 1992, September 25, 1992, October 15, 1992, November 17, 1992, December 10, 1992, March 15, 1993, April 14, 1993, June 6, 1993, and June 15, 1993.

Given the complexity of these cases, and the burdens of discovery, there have been frequent disputes. Now,

however, Plaintiffs agree that DuPont did come in compliance with its discovery obligations and the Court's Orders.

In light of these factors, and in the interest of justice, the Court hereby VACATES the above-listed Orders.

This 16th day of August, 1993.

/s/ J. Robert Elliott
Judge, United States District Court
Middle District of Georgia
Columbus Division

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Federal Rule of Civil Procedure 26(b)(4)
(pre-1993 amendments)

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

* * *

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party

seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Supreme Court, U.S.
FILED
JUL 2 1997
OFFICE OF THE CLERK

(2)

No. 96-1777

In The

Supreme Court of the United States

October Term, 1997

E. I. DUPONT DE NEMOURS AND COMPANY,

Petitioner,

v.

THE BUSH RANCH, INC., WILLIAM R. LAWSON, YELLOW RIVER GROWERS, ROY PHILLIP BARBER, CAROL H. BARBER, AND C. RAKER & SONS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTIONS PRESENTED

I. Whether the Eleventh Circuit erred in denying the inherent power of the District Court to regulate court proceedings through the imposition of civil sanctions, including monetary sanctions, thereby creating a conflict with the Fifth Circuit and a relevant decision of this Court?

II. Whether the Eleventh Circuit erred, subsequent to its Opinion filed October 17, 1996, in entering an Order of November 4, 1996, that upon remand, the Chief Judge of the district reassign all future proceedings in the action to a different District Judge, there having been no error assigned, nor any hearing held, where briefing or argument was permitted with regard to removal of the District Court Judge presiding in the case?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

I. Statement of the Case 1

A. Overview 1

B. Statement of Facts 2

C. Course of Proceedings and Disposition of the Case 5

II. The Eleventh Circuit Erred If It Limited The District Court's Inherent Powers To The Contempt Power, And If It Precluded An Award of Civil Sanctions Imposed Pursuant To Such Inherent Powers 8

A. Introduction 8

B. The District Court Can Impose Civil Sanctions Pursuant To Its Inherent Powers, Including, But Not Limited To, Its Inherent Contempt Power 9

III. Should The Matter Remain One For Civil Sanctions, The Eleventh Circuit Erred By Ordering That The Matter On Remand Be Assigned To A Different District Court Judge 15

IV. DuPont's Issues Lack Merit 18

V. Conclusion 22

TABLE OF AUTHORITIES

Page(s)

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Carroll v. The Jaques Admiralty Firm, 110 F.3d 290 (5th Cir. 1997) ..... *passim*

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Connally v. General Const. Co., 269 U.S. 385 (1926) 17

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) ..9, 14

Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) (*en banc*) 14

Downey v. Clauder, 30 F.3d 681 (6th Cir. 1994) 19

Harris v. City of Philadelphia, 47 F.3d 1333 (3rd Cir. 1995) 19

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) 10

Hicks on Behalf of Feiock v. Feiock, 485 U.S. 624 (1988) 14

In re Mroz, 65 F.3d 1567 (11th Cir. 1995) 12, 14

International Union, UMW v. Bagwell, 512 U.S. 821 (1994) 9

Kienle v. Jewel Tea Co., 222 F.2d 98 (7th Cir. 1955) 8

Link v. Wabash Railroad Co., 370 U.S. 626 (1962)..... 9

Liteky v. United States, 510 U.S. 540 (1994).....16, 17

Malautea v. Suzuki Motor Co., Ltd., 987 F.2d 1536 (11th Cir. 1993)..... 14

Michel v. State of Louisiana, 350 U.S. 91 (1955) 13

TABLE OF AUTHORITIES – Continued

Page(s)

Natural Gas Pipeline Co. v. Energy Gathering, Inc., 2 F.3d 1397 (5th Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994) 11, 12

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) 9

Topalian v. Ehrman, 3 F.3d 931 (5th Cir. 1993) 12, 13

United States v. Bertoli, 40 F.3d 1384 (3rd Cir. 1994) 16

United States v. Hudson, 7 Cranch 32 (1812) 9

United States v. Koblitz, 803 F.2d 1523 (11th Cir. 1986) 19

United States v. O'Quinn, 913 F.2d 221 (5th Cir. 1990) 19

Universal Oil Prods. Co. v. Root Refining Co., 328 U.S. 575 (1946) 10

Yakus v. United States, 321 U.S. 414 (1944) 13

CONSTITUTION UNITED STATES OF AMERICA:

Article III 17

Fifth Amendment 17

STATUTES:

28 U.S.C. § 144 16

28 U.S.C. § 455 ..... 15, 16

28 U.S.C. § 1927 10

28 U.S.C. § 2106 ..... 16, 17

TABLE OF AUTHORITIES – Continued

Page(s)

FEDERAL RULES:

Fed.R.Civ.P. 26 20

Fed.R.Civ.P. 26(e) 20

Fed.R.Civ.P. 26(e)(3) 20

Fed.R.Civ.P. 37 10

SUPREME COURT RULES:

Rule 15(2) 3

OTHER:

Eastern District of Texas Local Rules 10

Wall Street Journal, May 5, 1995, Section A, p. 5 6

I. STATEMENT OF THE CASE

A. Overview

This case can present issues of enormous importance to district courts and litigants in the fair conduct of civil litigation. Those issues, as phrased by Respondents, call for the exercise of this Court's supervisory power to settle a conflict within the circuits, to decide an important question of federal law that has not been decided by this Court, and to correct an erroneous decision in conflict with a relevant decision of this Court. This matter merits review only of those issues. DuPont's issues do not merit review, for this case was handled and decided in the District Court as a civil sanctions matter pursuant to that Court's inherent powers and not as a criminal contempt proceeding. DuPont has recognized as much, stating in its Eleventh Circuit Petition for Rehearing at p. 14: "[T]his is a civil action. It was docketed, captioned and treated below as such." If DuPont is right that there is no independent cause of action for civil contempt, *see* DuPont's Pet. at 7, then this admittedly civil action *must* have been one for civil sanctions, and it should have been reviewed as such for any abuse of discretion as to the sanctions imposed. Instead, having persuaded the Eleventh Circuit that what proceeded as a civil sanctions matter was somehow converted to a criminal contempt, DuPont now boldly urges that the matter be dismissed and that it escape unsanctioned despite clear and convincing evidence that it committed an egregious fraud on the court. Neither law nor logic supports such a result.

Respondents submit that the Eleventh Circuit has remanded this matter for the imposition of civil sanctions

in accord with its opinion, notwithstanding any separate action that the United States Attorney might take with regard to prosecution of a criminal action against DuPont. If this reading is not correct, then a writ of certiorari should be issued, because a real conflict then exists between the decision in the instant case, and *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) and *Carroll v. The Jaques Admiralty Law Firm*, 110 F.3d 290 (5th Cir. 1997), where the Fifth Circuit, following *Chambers*, squarely held that a district court may impose civil sanctions, *including a monetary fine*, using its inherent powers, pursuant to a show cause order issued post-judgment and after hearing held at which evidence was considered and findings made.[1]

B. Statement of Facts

Respondent nurserymen were Plaintiffs in three separate actions filed in 1992. Their claims were among hundreds made for damages caused by DuPont's fungicide Benlate 50DF. Respondents' actions, and a fourth, were consolidated for trial which began July 6, 1993. In that litigation, named *Bush Ranch* for one of the nurserymen, Plaintiffs alleged Benlate had been contaminated by toxic herbicides called sulfonylureas (SUs) which were manufactured at the same DuPont plant where DuPont manufactured the active ingredient in Benlate. Contrary to DuPont's statements, its discovery efforts were not

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[1] The remainder of this Response in Opposition assumes that the Eleventh Circuit has precluded any award of civil sanctions and thus that certiorari will be granted.

herculean.[2] DuPont limited discovery to a closed universe of documents that it had selected as relevant, and it opposed, resisted and obstructed discovery that went beyond that closed universe. During *Bush Ranch*, the Court expended vast judicial resources, including *10* hearings, trying to bring DuPont into compliance with its obligations as a litigant, the Federal Rules of Civil Procedure, its agreements, and that Court's orders. The Court addressed DuPont's gross discovery misconduct in

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[2] *See* DuPont's Pet. at 2. Respondents advise the Court, pursuant to Rule 15(2), of additional misstatements, including that: during trial, DuPont represented to the District Court *not* that the Alta Labs chemists were experts, but that they were fact witnesses, statements consistent with the common sense notion that the tests conducted by Alta and the methods and results of such tests are facts (DuPont's Pet. at 2); the pre-trial conference was not transcribed, and nothing said during that conference or in the Pre-trial Order relieved DuPont of its obligations to produce all data and documents relating to Benlate or authorized a limited understanding of the requirement that parties should produce and identify during depositions all documents on which experts based their opinions (DuPont's Pet. at 2); Alta chemists, DuPont witnesses and experts have testified that the Alta data and documents could support arguments and conclusions that SUs were indeed present in the soils and waters of the *Bush Ranch* Plaintiffs (DuPont's Pet. at 2-3); irrelevant allegations – that certain of the former *Bush Ranch* Plaintiffs (but none of those whose cases were tried) threatened to sue their former counsel, that the Judge, or a member of his staff, provided inside information to Plaintiffs' counsel and that Plaintiffs abruptly approached DuPont and settled for 1% of the prayed for compensatory damages – are unsupported by any credible or competent evidence (DuPont's Pet. at 3-4); the District Court did not adopt its 67-page Opinion and Order largely verbatim from Respondents' 149-page proposed findings and conclusions (DuPont's Pet. at 4).

12 written orders. App. at 31a-32a. Twice the Court imposed conditional monetary civil sanctions against DuPont. App. at 31a, 33a, 85a. On two other occasions, the Court ordered DuPont to pay costs, expenses and attorney's fees as sanctions. App. at 32a.

After *Bush Ranch* ended in settlement, Respondents became aware of evidence concealed by DuPont showing that the soils and waters taken from their lands for testing purposes *were contaminated* by DuPont's SUs. Alta Laboratories conducted these tests. The data and documents associated with the tests plainly should have been produced. They were not.[3] Through documents, arguments and testimony, DuPont misrepresented to Plaintiffs, the District Court and the jury the nature and the results of these tests. After conducting their own inquiry, Respondents filed a Petition praying that the District Court impose civil sanctions against DuPont for its fraud on the Court during and at the conclusion of the *Bush Ranch* product liability actions. *See* App. at 95a. After review of said Petition, the District Court issued a Show Cause Order.

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[3] DuPont did not willingly produce the Alta data and documents in Hawaii pursuant to a request, *see* DuPont's Pet. at 3; DuPont produced the materials, which during *Bush Ranch* had not been identified on any privilege log, *only after* the Hawaii Supreme Court rejected DuPont's protracted efforts to keep them concealed. Contrary to DuPont's statements at p. 10, Plaintiffs' counsel did not know of the volumes of material contradicting the statements, argument and evidence DuPont presented during the *Bush Ranch* litigation when said counsel joined in certifying to the District Court DuPont's apparent compliance with discovery.

C. Course of Proceedings and Disposition of the Case

DuPont fully litigated this matter in the District Court, filing motions to recuse the Judge, vacate the Show Cause Order and dismiss. It *never* urged that the matter was, or that it be converted into, a criminal proceeding; its witnesses never invoked the Fifth Amendment privilege regarding self-incrimination. DuPont filed an Emergency Motion For Stay and a Petition for Writ of Mandamus and Prohibition in the Eleventh Circuit prior to the hearing, seeking recusal of the Judge and a ruling that the hearing be prohibited. It did not urge in any filing that the matter was a criminal one. The Eleventh Circuit denied these efforts.

The District Court conducted a five-day evidentiary hearing. DuPont examined witnesses, presented evidence and filed a post-hearing submission. The Court entered an Opinion and Order on August 21, 1995, finding by clear and convincing evidence that DuPont had perpetrated a fraud on the Court by the commission of numerous sanctionable acts.[4] The District Court entered

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[4] The Court found that DuPont: consciously withheld and concealed data and documents which were due to be, and which the Court had ordered to be, produced; knowingly argued falsely to the Court and jury; knowingly elicited false testimony from an expert witness; knowingly filed a fraudulent motion to obtain an order vacating that Court's valid existing orders directing DuPont to comply with discovery orders and imposing civil sanctions; and induced reliance on said fraudulent motion so that on August 16, 1993, the District Court signed the order submitted by DuPont vacating those prior discovery and sanctions orders.

civil sanctions against DuPont pursuant to its broad array of inherent powers. The Court required distribution of the Alta data and documents and imposed monetary and publication sanctions. *See* App. at 90a-93a.[5] DuPont had within its power the opportunity to mitigate, or dispense with entirely, certain sanctions.

The District Court expressly reserved any decision with regard to the disposition of the actual and potential monetary sanctions pending DuPont's election of compliance and a second hearing, expressly stating that it would set a hearing date at which it would address, among other things, the "disposition of any funds paid by DuPont into the Registry of the Court, and the assessment of court costs, attorney's fees, and expenses associated with this show cause proceeding and imposition of sanctions." App. at 93a-94a. The Court noted that such disposition could "possibly include a number of public

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[5] The civil sanctions imposed were narrowly drawn to fit DuPont's misconduct, including this publication sanction. On May 5, 1995, during the hearing, DuPont published a full-page notice in the *Wall Street Journal* which included the following statement:

> We categorically deny any and all allegations that DuPont has improperly withheld information, either in the courtroom or elsewhere. From the outset of this unfortunate situation, we have acted honorably, within the judicial process, with our customers, and in full accord with the law.

App. at 92a, quoting *Wall Street Journal*, May 5, 1995, Section A, P. 5. By then, other courts already had found DuPont had withheld discoverable Benlate information ordered produced by those courts. The Circuit Court in Hawaii had imposed a $1,500,000.00 sanction. App. at 53a.

purposes as well as those persons and entities directly affected by DuPont's conduct." *Id.* Such election and second hearing never occurred because DuPont noticed its appeal and moved for a stay pending appeal. Over Respondents' objections that the stay affected the finality of the Order, that motion for stay was granted, and the appeal followed.

The Eleventh Circuit rendered its opinion on DuPont's appeal on October 17, 1996. That Court held that the District Court possessed jurisdiction to conduct an inquiry into whether the fraud on the court had occurred and to enter sanctions against DuPont on finding that it did. App. at 7a. It also held that "a reasonable finder of fact could conclude beyond a reasonable doubt that the District Court entered a lawful order of sufficient specificity commanding DuPont to produce the Alta data and that it willfully failed to obey that order." App. at 19a. However, in considering whether to affirm, the Panel focused only on the District Court's contempt power, to the exclusion of other inherent powers, and only on DuPont's willful failure to abide by the District Court's discovery orders, to the exclusion of DuPont's other wrongful conduct. App. at 6a n.3 and at 8a-9a. This narrow view led the Circuit Court to characterize the District Court's August 21 Opinion and Order as imposing only serious criminal contempt sanctions. Concluding that the proceedings were civil but the sanctions criminal, the Eleventh Circuit reversed and remanded. App. at 10a-11a. That Court did not address DuPont's failure to raise its argument that the matter was a criminal one until filing its brief on appeal.

II. THE ELEVENTH CIRCUIT ERRED IF IT LIMITED THE DISTRICT COURT'S INHERENT POWERS TO THE CONTEMPT POWER, AND IF IT PRECLUDED AN AWARD OF CIVIL SANCTIONS IMPOSED PURSUANT TO SUCH INHERENT POWERS.

A. Introduction

Deciding that some, but not all, of the sanctions imposed were punitive, the Eleventh Circuit reversed that portion of what it characterized a contempt order and remanded for proceedings consistent with its opinion. App. at 19a. The Court was silent about civil sanctions on remand, but it did indicate that the United States Attorney should begin an investigation. App. at 11a n.7. It thus seems conclusive that the holding alleged by DuPont to conflict with *Kienle v. Jewel Tea Co.*, 222 F.2d 98 (7th Cir. 1955), *i.e.*, that the Eleventh Circuit incorrectly remanded the matter to the District Court for criminal prosecution by private parties, that is, by these Respondents, is not what the Eleventh Circuit held at all. Thus, no conflict with *Kienle* exists.

If, however, the United States Attorney is to *begin* an investigation into the matter, just what has been remanded for further proceedings? To comport with this Court's precedent, as well as with that in the Eleventh Circuit and, in a recent decision, in the Fifth Circuit, Respondents submit that the matter has been remanded to the District Court for the imposition of civil sanctions, as that term has been clarified by the Eleventh Circuit, *and* for the United States Attorney's attention. Respondents' reading of the Eleventh Circuit's Opinion avoids conflict not only with *Kienle*, but also with *Chambers* and

Carroll. If this reading is, in the view of the Court, incompatible with the opinion rendered by the Eleventh Circuit, *then this Court should indeed grant a writ of certiorari.* Respondents urge that the Court in its review consider the Eleventh Circuit's erroneous limitation on a district court's inherent powers in a civil sanctions matter, and resolve the conflict which now exists between the Fifth and Eleventh Circuits in favor of recognizing again the full array of a federal court's inherent powers, and by affirming, or remanding for, an award of civil sanctions imposed pursuant to those powers for an abuse of the judicial process.

B. The District Court Can Impose Civil Sanctions Pursuant To Its Inherent Powers, Including, But Not Limited To, Its Inherent Contempt Power.

The inherent contempt power is but one of the bundle of powers which together comprise a federal court's inherent powers. "The inherent *powers* of federal courts are those which 'are necessary to the exercise of all others'. *United States v. Hudson,* 7 Cranch 32, 34 . . . (1812). The *most prominent* of these is the contempt sanction . . . ." *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764 (1980). *See also Chambers,* 501 U.S. at 46 (inherent powers broader and narrower than other means of imposing sanctions); *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 396 (1990) (listing contempt sanctions among others); *Link v. Wabash R.R. Co.,* 370 U.S. 626, 630 (1962) (court's authority to dismiss *sua sponte* for lack of prosecution an inherent power governed not by rule or statute); *Int'l. Union, UMW v. Bagwell,* 512 U.S. 821, 833 (1994) (courts have broad authority *through means other than contempt* to

penalize party's failure to comply with rules of conduct governing the litigation process, and such judicial sanctions never have been considered criminal); *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946) (federal courts have inherent power to investigate whether a judgment was obtained by fraud, to unearth such fraud effectively, and to assess the entire cost of the proceedings against the culpable party); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944) (historic power of equity to set aside fraudulently begotten judgments).

In *Carroll, supra*, 110 F.3d 290, the Fifth Circuit reviewed the district court's imposition of monetary sanctions on a litigant, post-judgment and pursuant to a show cause order, observing at the outset that a district court may rely on its inherent powers to impose sanctions when a party's deplorable conduct is not effectively sanctionable pursuant to an existing rule or statute. *Id.* at 292. That Court also noted that "other statutes and rules, such as 28 U.S.C. § 1927, Fed.R.Civ.P. 37, and the Eastern District of Texas Local Rules, do not squarely contemplate sanctions payable to the court for disruptive behavior." *Id.* at 293. In *Carroll*, the district court fined the litigant $7,000. The Fifth Circuit concluded that "[f]ines like this have been imposed by other federal courts for similar offenses." *Id.* at 294.

The Eleventh Circuit's decision limiting a district court's inherent powers to the inherent contempt power[6]

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[6] The Circuit Court incorrectly stated that Respondents here agreed that the sanctions order could not stand "without

and reversing the imposition of monetary sanctions as an improper punitive fine is in conflict with the Fifth Circuit's decision in *Carroll*, and is inconsistent with *Chambers, supra*, where this Court emphasized that neither statutes nor rules have abrogated federal courts' inherent powers to investigate and consider allegations of fraud on the court and abuse of the judicial process in proceedings which occurred before them. *Chambers*, 501 U.S. at 46. This Court in *Chambers* concluded that the inherent power of a court can be invoked even if procedural rules exist which sanction that same conduct. *See generally id.* at 47-50. *See also Nat. Gas Pipeline Co. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1407 (5th Cir. 1993) (citing *Chambers* and numerous cases from circuit courts for same proposition), *cert. denied*, 510 U.S. 1073 (1994). The inherent contempt power is only one of the inherent powers. The Eleventh Circuit erred in restricting the District Court, in a post-judgment inquiry, to the use of only an inherent contempt power, to the exclusion of other inherent powers, and in converting this civil matter to a criminal contempt.

This matter involved far more than the willful violation of a specific court order or series of discovery orders,

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the assistance of the district court's inherent contempt power . . . ." App. at 6a n.3. This fundamental error prompted the Court to "examine only the constitutionality of the [D]istrict [C]ourt's exercise of its inherent contempt power to determine whether the sanctions order can stand." *Id.* Consequently, a review of this matter as one concerning civil sanctions did not occur, and the entire decision was channeled toward an unnecessarily narrow fork in the road concerning "civil vs. criminal contempt", and into the labyrinth of whether a sanction is compensatory, coercive, remedial, punitive or deterrent.

which the Eleventh Circuit correctly held a reasonable finder of fact could find occurred. That Court's exclusive emphasis on the existence of an order and DuPont's willful violation of that order caused it to overlook this other sanctionable conduct and to focus solely on the issue of contempt. As in *Chambers*, *all* of DuPont's conduct was sanctionable, and no single rule was up to the task. The Eleventh Circuit erred in not considering the unchallenged findings of the District Court of these other wrongs, which wrongs could only be addressed comprehensively by imposing civil sanctions pursuant to the District Court's inherent powers. On review, the issues should be rephrased to consider the described conflict, and the Eleventh Circuit opinion should be reversed in those regards with which it conflicts with *Carroll* and the other cases cited above.

Proper review of this case as a civil sanctions matter emphasizes whether, under the circumstances, the District Court abused its discretion in " 'fashion[ing] an appropriate sanction for conduct which abuses the judicial process.' " *In re Mroz*, 65 F.3d 1567, 1575 (11th Cir. 1995), quoting *Chambers*, 501 U.S. at 44-45. *See also Topalian v. Ehrman*, 3 F.3d 931, 934 and 936 (5th Cir. 1993) (all sanctions reviewed for abuse of discretion); *Nat. Gas Pipeline Co.*, 2 F.3d at 1410 (reviewing court should view district court's sanctioning action "in a favorable (that is to say permissible) light"). The Eleventh Circuit never recognized this standard in its opinion, and that failure exacerbated, if not caused, its erroneous view of the case. The District Court fashioned and imposed appropriate civil sanctions against a litigant which beyond a reasonable doubt abused the judicial process. It made specific

factual findings to support its decision and to permit rigorous appellate review. *See Topalian*, 3 F.3d at 936. If any abuse of discretion were discovered on proper review, it could be described, and the matter remanded to the District Court for new sanctions properly fashioned consistent with the decision.[7]

A review of DuPont's first issue permits DuPont, which neither raised the issue in the District Court nor urged it in emergency motions to the appellate court, to litigate the matter civilly and then raise for the first time on appeal a claimed constitutional due process issue. *See Michel v. State of Louisiana*, 350 U.S. 91, 99 (1955) (constitutional rights may be forfeited in criminal as well as in civil cases by failure to assert timely that right), citing *Yakus v. United States*, 321 U.S. 414, 444 (1944). To accept as proper the conversion of this matter into one for criminal contempt at that late stage because the civil sanctions might have punitive and deterrent aspects

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[7] Because the District Court granted DuPont's motion to stay the sanctions Order pending appeal, thereby staying DuPont's obligation to make manifest its intentions to comply with the Order, the Court neither conducted the intended second hearing nor discussed any disposition of the funds. Even with this impediment, the Eleventh Circuit recognized the remedial, compensatory and coercive aspects of certain sanctions. App. at 9a and 10a at n.5 and n.6. But then, inconsistent with that recognition and without consideration of the effect of the stay, the Circuit Court concluded that the sanctions were punitive because DuPont was ordered to pay funds into the registry of the Court, a conclusion which ignores the clear intent of the District Court to do something further. Under *Carroll*, even a fine paid to the registry of the Court is a sanction within the District Court's discretion.

ignores Supreme Court authority that such aspects are appropriate and establishes a rule that anything less than solely remedial, compensatory and coercive sanctions may not be imposed. *See, e.g., Chambers,* 501 U.S. at 53-55; *Hicks on Behalf of Feiock v. Feiock,* 485 U.S. 624, 635-36 (1988); *Cooter & Gell,* 496 U.S. at 398. The Eleventh Circuit's decision is clearly inconsistent with the *Carroll* case, where the Fifth Circuit affirmed as an appropriate civil sanction the imposition of a monetary fine payable to the registry of the court. *Carroll,* 110 F.3d at 292 and 294.[8]

This Court should exercise its supervisory power to settle this conflict and decide the important matter of the scope of a federal court's inherent powers to sanction litigants post-trial for abuse of the judicial process. This Court's decision that the District Court properly employed all of its inherent powers necessarily overcomes the "civil vs. criminal contempt" dichotomy and any perceived errors regarding serious criminal contempt sanctions.

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[8] *See also Donaldson v. Clark,* 819 F.2d 1551, 1557 n.6 and n.7 (11th Cir. 1987) (*en banc*) (discussing monetary sanctions and publication sanctions); *In re Mroz,* 65 F.3d at 1575 (attorney's fees as sanctions); *Malautea v. Suzuki Motor Co., Ltd.,* 987 F.2d 1536, 1545-46 (11th Cir. 1993) (fines imposed on defendants and defense counsel).

III. SHOULD THE MATTER REMAIN ONE FOR CIVIL SANCTIONS, THE ELEVENTH CIRCUIT ERRED BY ORDERING THAT THE MATTER ON REMAND BE ASSIGNED TO A DIFFERENT DISTRICT COURT JUDGE.

After issuing its opinion, the Eleventh Circuit, without briefs, findings, citation to authority, or opinion, ordered that upon remand the Chief Judge reassign all future proceedings in this action to a different Judge. No jurisdiction exists in the Eleventh Circuit to make original findings of fact and conclusions of law so as to disqualify a District Judge from presiding in a case over which that District Court had jurisdiction, where on appeal no error of law was presented concerning his disqualification. No error was assigned, nor was any hearing held where briefing or argument was permitted, with regard to removal of the District Judge from presiding over the case. This subsequent Order, entered on November 4, 1996, is contrary to law and without basis in fact, inasmuch as the Eleventh Circuit previously had entered an Order dated May 1, 1995, denying both DuPont's Petition for Writs of Mandamus and Prohibition, and its Emergency Motion to Stay, by which DuPont sought removal of the District Judge from hearing the original proceeding for sanctions.

Entry of the November 4 Order is contrary to law and unconstitutional as to Respondents.[9] No statutory or constitutional authority exists for entry of such an Order,

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[9] It is likewise violative of the District Court Judge's Constitutionally guaranteed rights of due process, particularly as afforded by 28 U.S.C. § 455.

and reassignment to another District Judge would entail waste and duplication out of all proportion to any gains realized from reassignment, particularly where as here the history involves and the record includes an initial lengthy jury trial, followed by a lengthy sanctions hearing. There exists no admissible, credible evidence of an objective appearance of bias or prejudice or improper impartiality which derives from an extra-judicial source or which reveals such a high degree of favoritism or antagonism as to make fair judgment impossible as required by *Liteky v. United States*, 510 U.S. 540 (1994). *See also United States v. Bertoli*, 40 F.3d 1384, 1412-13 (3rd Cir. 1994) (following *Liteky*, and holding both that the record did not warrant the District Judge's recusal from the case, and that reassignment upon remand was inappropriate). The *Bertoli* Court found it especially important that the court *not* encourage tactics designed to force recusal, being keenly aware of the impact recusal might have on the conduct of all disputed matters and cases that District Judges try.

Such forced recusal creates a potential for mischief and mischaracterization to the point of subversion of justice. The only statutes dealing with disqualification for bias or prejudice are 28 U.S.C. §§ 144 and 455. While 28 U.S.C. § 2106 allows a court of appellate jurisdiction to remand the cause and direct entry of such appropriate judgment, decree, or order, or require such further proceedings be had, as may be just under the circumstances, that statute contains no express legislative provisions concerning disqualification and/or transfer of District Judges by remand order of an appellate court. Section 2106 is too vague and indefinite to supersede the specific

statutes dealing with bias or prejudice to disqualify a judge. A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law . . . ." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). Any construction and/or application of Section 2106 as authority for the Order is contrary to law, null, void and unconstitutional in that it would deny due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States and would violate the Separation of Powers provisions where the Legislative Branch of Government under Article III of the United States Constitution provides for the vesting of judicial power in such inferior courts as Congress may from time to time ordain and establish.

Even if Section 2106 were to be constitutional in content, construction and application, an important question of federal law not yet decided by this Court, *Liteky* puts to rest the first two factors identified under prior case law on reassigning this case on remand under that Section. Whether the District Judge would have difficulty putting his previous views and findings aside, and whether reassignment is appropriate to preserve the appearance of justice, were decided adversely to DuPont by the District Court on April 26, 1995. As to that Order, no appeal was taken or error assigned by DuPont. The final factor – whether reassignment would entail waste and duplication out of proportion to gains realized from reassignment – as discussed above, completely negates transfer to another District Judge. The Eleventh Circuit erred in so ordering.

IV. DUPONT'S ISSUES LACK MERIT.

Upon the grant of certiorari, review of the issues as suggested by Respondents, and reversal of those portions of the Eleventh Circuit opinion in conflict with *Chambers* and *Carroll*, any holding made by the Eleventh Circuit with respect to the findings of the District Court serving as a basis for a criminal contempt against DuPont would also be vacated. However, if this Court were to consider only the issues submitted by DuPont with respect to whether certiorari should be granted, the writ should not be granted, because DuPont's issues lack merit.

On appeal, DuPont expressly sought *vindication* for its conduct, asking that, notwithstanding any ruling on other issues which might lead to the reversal of the District Court's imposition of civil sanctions, the Eleventh Circuit conclude that no evidence supported criminal contempt. The Court thus considered, at DuPont's urging, the narrow question of whether there was sufficient evidence that DuPont was ordered to produce the Alta data. On review of the record, the Eleventh Circuit concluded that "a reasonable finder of fact could conclude beyond a reasonable doubt that the District Court entered a lawful order of sufficient specificity commanding DuPont to produce the Alta data and that it willfully failed to obey that order." App. at 19a.

Now displeased with the Eleventh Circuit's conclusions, DuPont mixes different issues and different standards in a vain attempt to create an issue worthy of review. DuPont states that the Eleventh Circuit's decision is in conflict with other circuit courts of appeals because it includes as an element of a criminal contempt a factual

finding that the District Court entered a lawful order of reasonable specificity, and because on review of a conviction for criminal contempt, the court would apply the sufficiency of the evidence standard of review. DuPont argues wrongly that the Eleventh Circuit's decision in these regards is somehow in conflict with cases cited in its Petition at 13-14. *Harris v. City of Philadelphia*, 47 F.3d 1333, 1340 n.5 (3rd Cir. 1995), stands at most for the propositions that questions of law are reviewed *de novo* and that "[w]hether the notice provided conformed to legal requirements is a question of law . . . ." The Third Circuit expressly stated that it did not "exercise plenary review over the district court's findings of fact or ultimate finding of contempt except to the extent that the finding of contempt rests on an erroneous conclusion of law." *Id.* at 1340 n.5. Neither in *United States v. O'Quinn*, 913 F.2d 221 (5th Cir. 1990), nor in *Downey v. Clauder*, 30 F.3d 681 (6th Cir. 1994), does either court describe the standard of review as *de novo*, as DuPont contends.

The Eleventh Circuit never indicated that the vagueness or overbreadth of a court order, which were the inadequacies alleged in *Harris*, *O'Quinn* and *Downey*, could not be subject to a legal ruling and reviewed on appeal *de novo*. The Court cited authority to that effect. *See* App. at 12a, citing *United States v. Koblitz*, 803 F.2d 1523 (11th Cir. 1986). There simply is no conflict, primarily because the Eleventh Circuit merely addressed DuPont's argument that no evidence supported the District Court's findings. The Eleventh Circuit did not address every issue which *might* have arisen.

DuPont wrongly contends that the Eleventh Circuit retroactively applied to the facts of this matter an

amended rule of civil procedure. If true, that issue might merit review. It is not. DuPont misleadingly reduces what actually transpired, and what the District Court and the Eleventh Circuit found and held, to three factors. *See* DuPont's Pet. at 15. The District Court set forth fully the extent and scope of DuPont's willful misconduct, *see* App. at 30a-54a, and its reasoning concerning DuPont's duty to produce and not to conceal the information about which much of this controversy revolves. *See id.; see also id.* at 59a-78a. Contrary to DuPont's representations here, its misconduct and the District Court's reasoning extend well beyond any single order. The District Court did not in any way base its decision to impose civil sanctions on Fed.R.Civ.P. 26(e) as amended. *See, e.g.*, App. at 62a-63a (quoting Fed.R.Civ.P. 26(e)(3) as it existed prior to the 1993 amendments). Nor did the Eleventh Circuit authorize retroactive application of that Rule, as amended, to DuPont's discovery obligations or to support any criminal conviction. The Eleventh Circuit cited to amended Rule 26 in footnote 8, but it did not at any point suggest that the violation of that Rule as amended could support a finding of criminal contempt.[10] At that juncture of its

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[10] Importantly, as it pertains to this case, the portions of the Rule as cited and relied on by the District Court are identical in meaning to the portions of the Rule as amended and cited by the Eleventh Circuit. *See* App. at 63a and App. at 14a (both courts emphasizing the duty to supplement or correct incomplete or incorrect responses if ordered by the court). Also important to this issue are that Plaintiffs in *Bush Ranch* propounded new requests for supplementation on May 24, 1993, and that DuPont responded falsely to said requests twice, on June 28, 1993, and on July 26, 1993, after the tests were conducted by Alta Labs, after the deposition of DuPont's expert who testified falsely

opinion, the Court was discussing the language of the discovery requests propounded by Plaintiffs in *Bush Ranch* and any express limitations therein. Later, the Court emphasized that "the question before this Court is not what the Federal Rules of Civil Procedure *required* DuPont to produce, but instead what a reasonable finder of fact could conclude that the district court *ordered* DuPont to produce." App. at 16a-17a n.9 (emphasis in original). The Eleventh Circuit also emphasized that the District Court "specifically ordered DuPont to go back and review its responses to the Plaintiffs' first request for document production and to fill in immediately *'all gaps* in documents responsive to Plaintiffs' original discovery requests.' " App. at 17a (quoting March 15, 1993, Order at 4) (emphasis added by Eleventh Circuit).

DuPont's second and third issues are manufactured ones that do not comport with either the facts of the case or the Eleventh Circuit's Opinion. All of DuPont's issues are entirely predicated on this matter being concerned solely with criminal contempt. When this case is read to concern the imposition of civil sanctions pursuant to *all* of the District Court's inherent powers, DuPont's issues become moot.

The Eleventh Circuit has reversed and temporarily relieved DuPont of any sanction for its misconduct. What DuPont seeks now is an advisory opinion from this Court

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about the tests, and, as to the later date, after three weeks of the *Bush Ranch* trial.

to substitute for those portions in the nature of an advisory opinion rendered by the Eleventh Circuit. This Court's resources should not be so wasted.

V. CONCLUSION

DuPont's issues do not merit review. This Court should review this case, if at all, only if the Eleventh Circuit has disallowed the imposition of civil sanctions against DuPont on remand, and if reviewed, it should be reviewed upon the important issues identified by Respondents. Alternatively, the decision of the Eleventh Circuit should be summarily reversed and the District Court decision affirmed in its entirety.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
JUL 15 1997
CLERK

No. 96-1777

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

E.I. DU PONT DE NEMOURS AND COMPANY,

Petitioner,

v.

THE BUSH RANCH, INC., WILLIAM R. LAWSON, YELLOW RIVER GROWERS, ROY PHILLIP BARBER, CAROL H. BARBER, AND C. RAKER & SONS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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15 pp

TABLE OF AUTHORITIES

Page

Cases

TWA v. Thurston, 469 U.S. 111 (1985) 1

Bush Ranch 8

Carroll v. Jaques Admiralty Firm, P.C.,
110 F.3d 290 (1997) 3

Federal Energy Administration v. Algonquin SNG, Inc.,
426 U.S. 548 (1976) 1

Harris v. City of Philadelphia,
47 F.3d 1311 (3d Cir. 1995) 7

Harris v. City of Philadelphia,
47 F.3d 1333 (3d Cir. 1995) 7

Jackson v. Virginia,
443 U.S. 307 (1979) 6, 7

Kienle v. Jewel Tea Co.,
222 F.2d 98 (7th Cir. 1955) 4

Lebron v. National R.R. Passenger Corp.,
115 S. Ct. 961 (1995) 5

NBA Properties, Inc. v. Gold,
895 F.2d 30 (1st Cir. 1990) 7

TABLE OF AUTHORITIES
(continued)

Page

Union Pac. R.R.. Co. v. Sheehan,
439 U.S. 89 (1978) 2

United States v. Hays,
115 S. Ct. 2431 (1995) 5

Other Authorities

Fed. R. Civ. P. 26(e) 7-9

R. Stern, E. Gressman, S. Shapiro & K. Geller,
Supreme Court Practice (7th ed. 1993) 1

S. Ct. Rule 12.5 ..... 1, 2

S. Ct. Rule 13.4 2

Respondents' "Brief in Opposition to Petition for Writ of Certiorari" only confirms the need for this Court to review this case. Respondents do not (and cannot) seriously deny the manifest circuit conflicts identified in DuPont's petition. Nor do they contest the importance of the case. Rather, they devote 18 of the 22 pages of their brief to urging the Court to grant *certiorari* on the two issues presented in their "opposition" instead of on the three issues presented in the petition. Respondents apparently hope thereby to obscure the real issues before this Court.

1. Respondents' "Brief in Opposition" Is Primarily an Improper and Untimely Cross-Petition.

Respondents' "brief in opposition" is nothing of the sort. Respondents do not oppose a grant of *certiorari* in this case. To the contrary, they *advocate* such a grant—but one limited to the issues presented in their brief in opposition rather than in the petition. That attempt to hijack the petition for their own ends violates this Court's most basic procedural rules.

A brief in opposition is not an appropriate vehicle for presenting new questions for this Court's review. If respondents wished to challenge any adverse aspects of the decision below, they were required to file a petition or cross-petition. *See, e.g., TWA v. Thurston*, 469 U.S. 111, 119 n.14 (1985); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976). They were also free, for up to thirty days after DuPont's petition was docketed, to file a conditional cross-petition. S. Ct. Rule 12.5. They chose to pursue neither of these alternatives. Instead, they sought—and received—an extension of time in which to file their brief in opposition to the petition for *certiorari*. *See* Appendix A.

A brief in opposition is not a substitute for a cross-petition. A cross-petition "may not be joined with any other pleading," S. Ct. Rule 12.5; it must be filed under its own docket number

after payment of the requisite docketing fee, *see id. See also* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 362 (7th ed. 1993) ("The cross-petition must be a separate document, not combined with the brief in opposition to certiorari."). Under no circumstances may a cross-petition be filed more than 30 days after the petition. *See* S. Ct. Rules 12.5, 13.4. Indeed, the Rules could scarcely be more explicit on this score: "The time to file a cross-petition *will not be extended.*" S. Ct. Rule 12.5 (emphasis added).

Accordingly, the bulk of respondents' "brief in opposition" is nothing but an improper and untimely attempt to file a cross-petition. The two "questions presented" in that brief seek to modify, not defend, the decision below: respondents ask this Court to (1) reverse the Eleventh Circuit's judgment reversing the district court's contempt judgment against DuPont, and (2) vacate the Eleventh Circuit's order assigning the case to a different district judge on remand. Such questions can properly be raised only in a timely petition or cross-petition. Because respondents failed to file any such document, the two questions presented in their brief in opposition are "not properly before the Court." *Union Pac. R.R.. Co. v. Sheehan*, 439 U.S. 89, 92 n.2 (1978) (*per curiam).*

In any event, respondents' two "questions presented" are wholly unworthy of this Court's review on the merits. Respondents first argue that the Eleventh Circuit erred by failing to affirm the district court's unprecedented sanctions as an appropriate exercise of unspecified "inherent powers" *distinct from* the inherent contempt powers. Opp. at 8-14. Even a moment's reflection dooms this argument. The stringent limitations on the judicial contempt powers would be rendered a dead letter if courts could simply declare that they were imposing sanctions under inherent powers *other than* contempt. The issue, at any rate, is wholly academic here, as the District Court below made it crystal clear that it *was* relying

on its inherent contempt powers. *See, e.g.*, Pet. App. at 58a ("DuPont's conduct constitutes contempt of this Court."); *id.* at 56a ("The power to punish for contempts is inherent in all courts.") (internal quotation omitted); *id.* at 57a ("Civil contempt has a remedial purpose, not the least of which is to give force and vitality to judicial decrees."). Indeed, respondents did not challenge this point below; rather, they argued that the contempt sanctions in this case were *civil*, rather than *criminal*, in nature.[1]

Respondents next argue that the Eleventh Circuit violated their constitutional rights (as well as those of the District Judge) by ordering this case assigned to a different judge on remand. Opp. at 15-17 & n.9. It goes virtually without saying, however, that neither litigants nor judges have a constitutionally protected "liberty" or "property" interest in the adjudication of a particular case by a particular judge.

2. Respondents Cannot Justify the Eleventh Circuit's Failure to Dismiss this Inherently Criminal Private Action.

Starting from the faulty premise that this case involves the exercise of *civil*, rather than *criminal*, sanctioning authority, respondents defend the Eleventh Circuit's decision to remand, rather than dismiss, the action. According to respondents, "the matter has been remanded to the District Court for the imposition of *civil* sanctions." Opp. at 8 (emphasis added). Respondents acknowledge that, if they are mistaken on this

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[1] By the same token, respondents' asserted circuit conflict is illusory. In *Carroll v. Jaques Admiralty Firm, P.C.*, 110 F.3d 290 (1997), the Fifth Circuit did not even mention the distinction between civil and criminal sanctioning powers, much less suggest that courts are free to entertain independent actions for civil contempt or to impose enormous punitive sanctions of the sort involved here without affording the procedural safeguards of the criminal law.

point, the first question presented in the petition—whether the Eleventh Circuit erred by failing to dismiss the case—does indeed merit this Court's review. *See* Opp. at 9; *cf. id.* at 2 n.1.

The existence of the circuit conflict presented by the first issue in the petition, however, does not depend on the nature and scope of the remand. It is clear, at the very least, that the Eleventh Circuit has kept this action alive in circumstances where other circuits would have ordered it dismissed. Regardless of the nature and scope of the remand, this case is on all fours with *Kienle v. Jewel Tea Co.*, 222 F.2d 98 (7th Cir. 1955). There, as here, a private party brought an independent action seeking to punish a former litigant for alleged discovery violations in a defunct case, and thereby to "vindicate" the district court's authority. In contrast to the courts below, the *Jewel Tea* court recognized that no jurisdictional basis existed for any such action. That court explained that an independent action for sanctions must be "dismissed" where the "pleading sought no remedy for [the plaintiff] through coercive punishment of [an] alleged contemnor, but, on the contrary, asked the court to vindicate its power . . . by assessing a definite punishment for criminal contempt." *Id.* at 100. Other courts, along the same lines, have recognized that there is no such thing as an independent cause of action for civil contempt. *See* Pet. at 7. Accordingly, the District Court here erred by refusing to dismiss this action for lack of jurisdiction in the first instance, and the Eleventh Circuit in turn erred by remanding the case for yet further proceedings.

In any event, respondents' assertion that the Eleventh Circuit has remanded the case for *civil* sanctions finds no support in the opinion below. To the contrary, the opinion contemplates that any potential further proceedings would be *criminal* in nature. Thus, in explaining its decision to address the sufficiency of the evidence, the Eleventh Circuit stated that "a ruling on this issue will either confirm or remove

permanently a risk of the imposition of serious *criminal contempt sanctions* against DuPont." Pet. App. at 11a (emphasis added). Only by resolving that issue against DuPont, the Court explained, could it "allow this case to proceed further." *Id.* *See also id.* at 12a (noting that the opinion should not be construed "to predetermine the outcome of *the criminal contempt proceeding*") (emphasis added). At this juncture, respondents do not have the luxury of contesting the Eleventh Circuit's conclusion that this proceeding is inherently criminal, rather than civil, in nature. Because they failed to file a cross-petition, they must take the decision below as they find it.

Respondents also err in suggesting that DuPont failed to preserve this issue below because the company "neither raised the issue in the District Court nor urged it in emergency motions to the appellate court." Opp. at 13. That suggestion is incorrect as a matter of fact and irrelevant as a matter of law. DuPont *did* argue from the outset that there was no jurisdictional basis for this independent action for sanctions. Both the District Court and the Eleventh Circuit expressly (albeit incorrectly) rejected that argument. *See, e.g.*, Pet. App. at 54a-56a, 7a. Although that alone is more than enough to preserve the issue for this Court's review, *see, e.g., Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995), it is also axiomatic that issues relating to the jurisdiction of the federal courts are not subject to waiver, *see, e.g., United States v. Hays*, 115 S. Ct. 2431, 2435 (1995).[2]

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[2] Respondents also suggest in passing that the district court's order may not be final because the court stayed that order pending appeal and never held a hearing to allocate the fines that DuPont was ordered to pay into the court registry. *See* Opp. at 7, 13 n.7. That suggestion is baseless. A stay pending appeal does not deprive the stayed order of its finality—the whole point of the stay mechanism, after all, is to *protect* the right to an orderly

(continued...)

3. Respondents Cannot Justify the Eleventh Circuit's Holding that the Specificity of a Court Order Is a Question of Fact, not Law.

With respect to the second issue presented in the petition—whether the interpretation of a court order for purposes of contempt is a question of *fact* or of *law*—respondents make no more than a token effort to deny the circuit conflict. *See* Opp. at 19. According to respondents, the Eleventh Circuit "never indicated" that the interpretation of such an order "could *not* be subject to a legal ruling and reviewed on appeal *de novo*." *Id.* (emphasis added). Nor, they conversely contend, do the cases cited by DuPont on the other side of the split "describe the standard of review as *de novo*." *Id.* Thus, respondents apparently take the position that no standard of review of any sort can be discerned from any case. Even a cursory review of the opinion below and the cases cited in the petition shows that they are wrong.

The Eleventh Circuit expressly based its decision to remand, rather than dismiss, this case on the proposition that the existence of a court order of sufficient clarity to support a contempt judgment is a question of *fact* rather than of *law*. *See* Pet. App. at 11a-12a. The court pointedly refused to decide whether any such order existed, but instead held that the issue must be decided by a finder of fact. *Id.* at 11a. Drawing upon the deferential sufficiency-of-the-evidence standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the court described the relevant inquiry as whether "there is insufficient evidence from which a reasonable finder of fact

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[2] (...continued)
appeal, not defeat it. Because the sanctions order required DuPont to pay money into the court registry and take other actions within a specified number of days, it is unquestionably an appealable final order *regardless* of how the district court might ultimately have decided to spend the money.

could conclude that there was a reasonably specific order requiring DuPont to produce the Alta data." Pet. App. at 12a. In applying that standard, the court emphasized that it was viewing the evidence, and deciding all credibility issues, in the light *most favorable* to the contempt charge, and drawing all inferences in *favor* of guilt. *Id.*

The circuit conflict created by that decision could not be more stark. As explained in the petition, *see* Pet. at 13-14 & n.2, no other circuit applies the deferential *Jackson* standard to determine the existence of a court order of sufficient clarity to justify a judgment of contempt. To the contrary, other circuits have approached the clarity of a court order as a matter of *law* subject to *de novo* review. *See id.* Even respondents concede (as they must) that the Third Circuit has expressly held that whether an order is specific enough to "'confor[m] to the legal requirements [for contempt] is a *question of law*.'" Opp. at 19 (quoting *Harris v. City of Philadelphia*, 47 F.3d 1333, 1340 n.5 (3d Cir. 1995)) (emphasis added). *See also Harris v. City of Philadelphia*, 47 F.3d 1311, 1321 n.11 (3d Cir. 1995) (characterizing specificity of court order for purposes of contempt as "a legal issue"). Many other circuits have also treated the specificity of a court order as a matter of law, *see* Pet. at 13-14 & n.2, even if they have been less explicit than the Third Circuit in articulating that point. The Eleventh Circuit's contrary approach turns the settled law of contempt on its head by construing any ambiguity in a court order *against*, rather than in *favor* of, an alleged contemnor. *See* Pet. at 11 (citing, *inter alia*, *NBA Properties, Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990) (Breyer, J.) (appellate court reviewing a contempt judgment "must read any ambiguities or omissions in . . . a court order as redounding to the benefit of the person charged with contempt.")).

4. Respondents Cannot Justify the Eleventh Circuit's Retroactive Application of the Amended Version of Fed. R. Civ. P. 26(e).

Finally, respondents assert that DuPont has "manufactured" the third issue presented in the petition—the propriety of the Eleventh Circuit's retroactive application of the 1993 amendments to Federal Rule of Civil Procedure 26(e)—by presenting a "misleadin[g]" description of the opinion below. Opp. at 21, 20. According to respondents, the Eleventh Circuit "did not at any point suggest that the violation of that Rule as amended could support a finding of criminal contempt." *Id.* at 20. Again, even cursory review of the opinion shows that they are mistaken.

The Eleventh Circuit relied on the amended version of Rule 26(e) as an essential link in the chain of reasoning underlying its conclusion that a reasonable factfinder could find DuPont guilty of violating a discovery order. The order that the Eleventh Circuit believed could be construed to require production of the disputed Alta raw data *predated* the existence of those data. *See* Pet. App. at 12a-13a. Thus, unless DuPont was subject to a duty to supplement its discovery responses, it *could not* have violated that order. The Eleventh Circuit acknowledged as much, but identified the amended version of Rule 26(e) as the source of such a duty. *See id.* at 14a n.8. That version of the Rule, however, did not take effect until December 1993—well *after* the conclusion of discovery in *Bush Ranch* (indeed, after the *Bush Ranch* litigation had been settled and dismissed with prejudice). Accordingly, the Eleventh Circuit impermissibly authorized the potential imposition of criminal liability based on the retroactive application of a new substantive duty.

Respondents attempt to deny this error by suggesting that the relevant supplementation duty arose not from the amended version of Rule 26(e), but from a March 15, 1993 order

requiring DuPont to fill in "'all gaps in documents responsive to Plaintiffs' original discovery requests.'" Opp. at 21 (quoting Order Imposing Sanctions Dated March 15, 1993, at 4). That is incorrect. As the Eleventh Circuit acknowledged, the Alta raw data were generated "a couple months *after* the district court issued its gap-filling order." Pet. App. at 17a (emphasis added). That is why the Court of Appeals was forced to rely on the amended version of Fed. R. Civ. P. 26(e) as the source of the alleged supplementation duty—there was no supplementation order in effect at the time the Alta raw data were generated, and hence no duty to produce those data. The Eleventh Circuit's retroactive imposition of such a duty violates both bedrock norms governing the retroactivity of statutes as well as the Ex Post Facto Clause.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the writ of *certiorari* should be granted. In the alternative, the decision below should be summarily reversed to the extent that the Eleventh Circuit relied upon retroactive application of the 1993 amendments to Fed. R. Civ. P. 26(e) in

determining that there could potentially be a finding of contempt in this case, and the case should be remanded for the Eleventh Circuit to reconsider whether any remand to the District Court is permissible.

Respectfully submitted,

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July 15, 1997

APPENDIX A

SUPREME COURT OF THE UNITED STATES
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WASHINGTON, D.C. 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

May 30, 1997

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479-3011

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RE: E.I. DuPont de Nemours and Company v. Bush Ranch, Inc., et. al.
No. 96-1777

Dear Mr. Pope:

Your request of May 27, 1997 for an extension of time in which to file a response to the petition for a writ of certiorari in the above-entitled has been granted; the time has been extended to and including July 7, 1997.

Very truly yours,

WILLIAM K. SUTER, Clerk

By

Francis J. Lorson
Chief Deputy Clerk

cc: Edward W. Warren